Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC CLARK,
in His Capacity as Secretary of State
for the State of Mississippi,
Petitioner

v.

J. RANDOLPH LIPSCOMB, on behalf of himself and all others similarly situated; MAYOR, CITY OF COLUMBUS; CITY COUNCIL OF THE CITY OF COLUMBUS, MISSISSIPPI; & THE COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 95 of the Mississippi Constitution provides that state lands "shall never be donated, directly or indirectly, to private corporations or individuals." The Mississippi Supreme Court has since applied this provision to nullify grossly inadequate rental rates of ancient leases of Sixteenth Section school land. In the present case, the Fifth Circuit held that Section 95 would violate the Contracts Clause of Article I, § 10 if applied to invalidate the pennies per lot yearly rental prices of over 1400 early nineteenth-century leases that contain "renewal forever"clauses. The questions presented are:

1. Is the injury in fact requirement of Article III standing met where the only allegation of injury is the existence of a general "barrier" to all leaseholders in obtaining financing for the sale of these leases and where the plaintiff leaseholder has made no allegation that he intends to sell the lease or sublease his property?

2. Does this Court's decision in *Idaho v. Coeur d'Alene Tribe* provide an Eleventh Amendment defense to litigation that is originally initiated against governmental defendants in state court as a quiet title action, then refiled in federal court as an action to "confirm and quiet" title and, while litigated pursuant to an amended complaint limited to a request for declaratory relief, seeks to validate "renewable forever" leases of public lands based on grossly inadequate consideration, when (i) the sole purpose of the lands is to generate funds for schools and (ii) their leasing and sale fall under a state constitutional provision prohibiting their "donation" to private persons?

3. Does the Contracts Clause prevent a state constitutional provision containing a general prohibition against the donation of state land from being applied to invalidate grossly inadequate rental prices of early nineteenth century leases of Sixteenth Section school lands?

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PETITION FOR A WRIT OF CERTIORARI

Eric Clark, the Secretary of State of Mississippi, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is reported at 269 F.3d 494 and attached as Appendix A. The district court opinion is reported at 88 F. Supp. 2d 640 and attached as Appendix C. An

earlier opinion of the Fifth Circuit is reported at 145 F.3d 238 and is attached as Appendix B. The district court opinion from which that appeal was taken is reported at 1996 WL 671715 and is attached as Appendix D.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on October 5, 2001 and the petition for rehearing denied on November 13, 2001. (Appendix E). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 10, Clause 1 of the United States Constitution provides in pertinent part that "no State shall ... pass any ... Law impairing the Obligation of Contracts."

Section 95 of the Mississippi Constitution of 1890 provides in pertinent part that "[l]ands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals."

Section 29-3-1 of the Mississippi Code provides in pertinent part as follows: "Sixteenth section school lands ... constitute property held in trust for the benefit of the public schools and must be treated as such .... It shall be the duty of the board of education to manage the school trust lands ... as trust property. Accordingly, the board shall assure that adequate compensation is received for all uses of the trust lands ...."

Act of December 13, 1830, 1830 Mississippi Laws 14th Session, Chapter II, pages 9-10 provides for the insertion of a "renewable forever" clause in ninety-nine-year leases entered into for Sixteenth Section land in Columbus.

STATEMENT OF THE CASE

INTRODUCTION

The leading newspaper in Mississippi is *The Clarion-Ledger*. Commenting on the Fifth Circuit's opinion in the instant case, the editor characterized the lower court's decision as the "only instance" in which the Secretary of State and Attorney General were unsuccessful in protecting public lands "from being taken by private individuals through long-ago sweetheart deals."[1] Finding it "perplexing that [something] so wrong can be legally right," the editorial took the position that the compelling interests of the State in "protecting the public's property" and fulfilling its obligation to maximize funds for the education of children imposed a "moral imperative" to file for certiorari.[2] This fact, coupled with a decision by the Fifth Circuit that clearly meets Rule 10's criteria for the exercise of jurisdiction by this Court, provides the foundation for this petition.

BACKGROUND

As a condition for Mississippi's admission as a state in 1817, Congress provided that certain segments of public lands (known as Sixteenth Section land) were to be surveyed and

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[1] Editorial, *Clarion-Ledger* 8A (Nov. 19, 2001).

[2] *Id.*

"reserved for the support of schools"[3] In accordance with this mandate, the Mississippi Code provides that these lands "constitute property held in trust for the benefit of the public schools and must be treated as such."[4] As trust lands they are also subject to the "no-donation clause" of Section 95 of the Mississippi Constitution which requires that "[l]ands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals"[5] It was not until recent years, however, that the clearly-expressed objective of the congressional grant, the unambiguous legislative declaration that the State holds the land in trust for its children, and the protections incorporated into Mississippi's constitution finally proved sufficient to insure that those given control over trust lands would fulfill their statutory and constitutional obligations.

The period prior to 1978 is described by the Mississippi Supreme Court as a "century of disregard"[6] of trust obligations in which "sweetheart deals" were the norm.[7] In that year,

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[3] Land Sales Act, 3 STAT. 375 (1817). For a detailed history of Sixteenth Section land in Mississippi see *Papasan v. Allain*, 478 U.S. 265 (1986).

[4] MISS. CODE § 29-3-1 (2000).

[5] MISS. CONST. Art. IV, § 95 (1998).

[6] *Hill v. Thompson*, 564 So. 2d 1, 12 (Miss. 1990) (*en banc*).

[7] The practice did not become a matter of public concern until 1975 when lawsuits were brought contending that leases for nominal amounts violated the "no donation" prohibition in Section 95. *Morrow v. Vinson*, 666 So. 2d 802 (Miss. 1995) (two properties with fair market rental value of $2,000/year leased for one-time payment of $150); *Bd. of Educ. v. Hudson*, 585 So. 2d. 683 (Miss. 1991) (detailing massive profits from portions of 3.5 acres of school land leased for one-time fee of $150 for ninety-nine years); *Talley v. Bd. of Supervisors*, 353 So. 2d 774 (Miss.

legislation was enacted vesting control over trust lands with school boards.[8] Thereafter, the Secretary of State campaigned intensively to explain the "no donation" prohibition in the Mississippi Constitution and to direct that school boards throughout the state take action on questionable leases. Litigation then arose as to (a) whether leases for inadequate consideration were voidable as an unconstitutional donation under Section 95; and (b) what criteria determined whether the dollar amount of a lease, when entered into, was so low as to amount to a donation.

The case incorporating the Mississippi Supreme Court's final, definitive pronouncement on these issues is the *en banc* decision of *Hill v. Thompson*.[9] At issue was a parcel of Sixteenth Section land leased in 1960 for a one-time payment of $7.50 for ninety-nine years. After refusing to renegotiate, the leaseholder brought suit to quiet title. Upholding the State's position as to the applicability of the "no donation" provision of Section 95, the court voided the lease, finding that the amount of consideration was "so grossly inadequate as to shock the conscience."[10] Cognizant of the difficulties involved in determining present rental value, the court remanded with directions for the trial court to take into consideration all equitable interests including those of the present leaseholder,

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1978) (county entered into thirteen leases of school land for rentals varying from twenty to eighty-two cents per acre); *Keys v. Carter*, 318 So. 2d 862 (Miss. 1975) (320-acre tract with fair market rental value of $4,000/year leased for $170); *Holmes v. Jones*, 318 So. 2d 865 (Miss. 1975) (150 acres of school land leased personally to superintendent of schools for twenty-five years at $37.50/year and then subleased for $900/year).

[8] MISS CODE § 29-3-1 (2000).

[9] 564 So. 2d 1 (Miss. 1990) (*en banc*).

[10] *Hill*, 564 So. 2d at 10.

lienholders and title insurance companies.[11]

Following *Hill*, leases allegedly based on grossly inadequate consideration were renegotiated or subjected to litigation throughout the state. Because of special legislation applicable only to leases in the city of Columbus, however, leaseholders in that municipality continue to claim that their rights remain unaffected by the decision. The legislation at issue and its history is not in dispute.

In 1821, the Mississippi Legislature authorized the incorporation of the town of Columbus and gave school trustees the authority to lease trust lands "for the term of ninety-nine years, reserving an annual rent therefor."[12] Subsequently, in 1829, the legislature petitioned the United States Congress to give the trustees authority to sell Sixteenth Section land in fee simple. Receiving no response, the legislature enacted a statute in 1830 authorizing the insertion of the phrase "renewable forever" in all past and future Sixteenth Section leases in the city.[13] Leases finalized under this provision were reissued[14] in 1920 "for a period of ninety-nine years" accompanied by the right to "renew forever" in the year 2019.

Today there are over 1400 ninety-nine-year renewable-forever leases in downtown Columbus. Lessees include banks, churches, stores, homeowners, the city, the county and a university. Although the properties have a collective value of over thirty million dollars, total income generated for the

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[11] *Id.* at 12.

[12] *See* ch. 46, 1821 Miss. Laws, pp. 73-74.

[13] Act of December 13, 1830, ch. 2, 1830 Miss. Laws 14th Sess., pp. 9-10.

[14] Pursuant to statutory authorization given in 1914. *See* Act of Mar. 20, 1914, ch. 426, 1914 Miss. Laws pp. 496-97.

benefit of the city's school system is only a little over $2,500 a year. As pointed out by the court below:

> The rental rates paid on the Columbus leases have remained unchanged for one hundred and eighty years. Leaseholders of lots of property in downtown Columbus pay pennies in rent per year, a small fraction of their fair market rental.[15]

PROCEEDINGS BELOW

In compliance with statewide directives issued by the Secretary of State following *Hill*, the president of the Columbus School Board announced that Sixteenth Section leases were invalid and would have to be renegotiated. Contending that the "renewable forever" clauses distinguished Columbus leases from those addressed by *Hill*, a leaseholder filed suit in state court against the Columbus Municipal Separate School District to "confirm title." As the holder of two ninety-nine-year "renewable forever" leases for $.93 and $.11 a year, Respondent Lipscomb intervened in the proceedings on behalf of himself and 1,484 other leaseholders in the city. Thereafter, the city council joined with the leaseholders in opposing the school board's position that the leases were void. Following an estimated expenditure in excess of $100,000 in attorneys' fees by all parties, agreement was reached on a procedure designed to terminate what all conceded to be unnecessarily expensive and complicated litigation[16]

The contemplated procedure was deceptively simple. After a voluntary dismissal of the state-court proceedings, a

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[15] App. A at 3a.

[16] *See 16th Section Foes Shift Toward Settlement, Commercial Dispatch* 1A (Dec. 20, 1991).

class-action lawsuit would be filed in federal court. Assuming agreement on one of the various proposals then under consideration, a settlement would be filed and—following notice procedures provided by Rule 23—would provide the basis for a final judgment removing all "clouds" on leasehold titles.[17]

The state-court suit was dismissed, and in January of 1992 Respondent Lipscomb filed suit to "confirm and quiet" title on behalf of himself and all other holders of Sixteenth Section land in the Northern District of Mississippi. The School District and the Secretary of State[18] were named defendants. In addition to causes of action found in the state-court complaint, it was also alleged that the Contracts Clause of the United States Constitution prohibited application of the "no donation" clause of the 1890 Constitution to their 1830 statutorily-authorized "renewable forever" contract rights.

In the latter part of 1992, a settlement agreement signed by Respondent Lipscomb, the mayor, city council and school board was filed with the district court. It stipulated an annual pro rata assessment on each of the 1,484 leaseholders (approximately $67.00 for each lessee) that would produce $100,000 a year for the following fifteen years. Incorporating the notice and opt-out provisions of Rule 23(e), it became effective unless rejected by a majority of leaseholders. The refusal by the Secretary of State to sign, however, precluded the agreement's intended use to terminate the litigation.

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[17] *Id.*

[18] Because of a decision by the federal Department of Housing and Urban Development to neither insure or authorize loans on trust property, it was also a named defendant. The department, however, has assumed the status of a nominal party throughout the litigation.

The initial decision by the district court to abstain[19] was reversed and remanded by the Fifth Circuit,[20] with directions for the district court to proceed to the merits. At this point, six years after filing suit, Respondent amended his complaint to delete all references to relief designed to "confirm and quiet" title in favor of seeking a declaratory judgment that the "renewable forever" provisions were valid. Thereafter, the district court, without case citation or analysis, held that the Contracts Clause protected the "renewable forever" leases from "impairment under subsequent state law," *i.e.,* the "no donation" clause of Section 95 of the Mississippi Constitution.[21] Employing a lengthy, technical analysis of the Contracts Clause that excluded the factor that Section 95 is a law of general applicability, the lower court affirmed.[22] It is from this decision that certiorari is sought.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' OPINION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT WITH RESPECT TO THE "INJURY IN FACT" REQUIREMENT OF ARTICLE III

The "essential and unchanging,"[23] rudimentary requirement of Article III that a plaintiff must demonstrate "an

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[19] App. D at 68a-73a (citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).

[20] App. B.

[21] App. C at 62a.

[22] App. A at 11a-32a.

[23] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

invasion of a legally protected interest" that is "actual or imminent, not 'conjectural' or hypothetical,'"[24] is not met in this case. Specifically, although the case has been in litigation for over twelve years, the record provides no evidentiary support for the conclusion that the "injury in fact" requirement has been met.

The March 1, 1990 announcement by the president of the school board calling into question the validity of Sixteenth Section leases in Columbus is the driving force behind this litigation. The only finding on the impact of the announcement is a conclusion by the district judge that it "affected leaseholders in the Columbus sixteenth section by diminishing the fair market value of their property and creating a barrier to obtaining financing for the sale of these interests."[25] This determination of generalized injury, however, is insufficient to give the federal courts jurisdiction to entertain Respondent's Contracts Clause concerns with the application of Section 95 of the Mississippi Constitution to his leases.

At no point in the proceedings below has Respondent claimed an intent to sell or lease his property. Thus, even assuming a generalized "chill" affecting the marketing of Sixteenth Section land, Mr. Lipscomb's status is unchanged in that he continues to have the unfettered right to remain in possession until 2019 for $.93 and $.11 a year.

The decision most clearly analogous to the instant case is *Warth v. Seldin*.[26] One plaintiff in litigation brought to contest the constitutionality of an exclusionary zoning ordinance was a home builders organization representing itself and its members. The analysis employed by this Court to

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[24] *Id.*

[25] App. C at 62a.

[26] 422 U.S. 490 (1975).

explain why allegations made on behalf of the organization in support of standing were insufficient is directly applicable to Respondent Lipscomb:

> The complaint refers to no specific project that is currently precluded either by the ordinance or by [the city's] action in enforcing it. There is no averment [that the plaintiff] has applied to [the city] for a building permit or a variance with respect to any current project. Indeed, there is no indication that [the city has] delayed or thwarted any project .... In short ... [the plaintiff] has failed to show the existence of any injury ... of sufficient immediacy and ripeness to warrant judicial intervention.[27]

See also Lujan, 504 U.S. at 564 (1992) (intent to visit contested area "some day" not "imminent injury" for purposes of standing); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (alleged standing dependent upon likelihood of plaintiff's being subjected to choke hold by member of police department insufficient to meet "real and immediate" threat requirement); *Golden v. Zwickler*, 394 U.S. 103, 109 (1969) (where plaintiff contested restriction on leafleting, claim that targeted individual may become "a candidate for Congress again" not "a substitute for evidence that this is a prospect of 'immediacy and reality'").

Furthermore, an assumption underlying this litigation is that if the school board or responsible state official determines that the leases entered into in the 1800s were based on unconscionable terms and brings a civil suit in state court, Respondent's Contracts Clause defense will fail. Pursuant to

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[27] *Id.* at 516.

this Court's holding in *O'Shea v. Littleton*,[28] however, litigants cannot demonstrate imminent, threatened harm with speculative allegations that injury will occur "*if* they are charged [and] held to answer and tried." This proposition, coupled with the lower court's failure to undertake the threshold inquiry into Article III's "injury in fact" requirement,[29] places the opinion in direct conflict with decisions of this Court.

THE DECISION OF THE FIFTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THE THIRD, TENTH, SEVENTH AND SIXTH CIRCUITS AND RAISES AN ISSUE UNRESOLVED BY THIS COURT IN *IDAHO V. COEUR D'ALENE*

Idaho v. Coeur d'Alene Tribe[30] is the latest decision by this Court discussing limitations imposed by the Eleventh Amendment when *Ex parte Young*[31] is employed to invoke federal court jurisdiction. Arising in the context of American Indians suing state officials seeking a federal-court determination of title to submerged lands, the Court held that the Eleventh Amendment barred relief. Other than agreement that a proper interpretation of *Young* "must reflect a ... respect for state courts instead of a reflexive reliance on an obvious

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[28] 414 U.S. 488, 497 (1974).

[29] Although the issue was not raised by the parties below, that fact is irrelevant. *United States v. Hays*, 515 U.S. 737, 742 (1995) (standing requirement is jurisdictional and not subject to waiver); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (requiring strict compliance with the standing requirement).

[30] 521 U.S. 261 (1997).

[31] 209 U.S. 123 (1908).

fiction,"[32] however, a fragmented five-Justice majority found no common ground

In the principal opinion, Justice Kennedy, joined by Chief Justice Rehnquist, emphasized a "careful balancing," "case-by-case" approach[33] that incorporated such factors as the absence of an available state forum,[34] analysis of the particular federal right involved,[35] and whether "'special factors counsel[] hesitation'" in the exercise of jurisdiction.[36] Turning to the specific facts of *Coeur d'Alene*, Justice Kennedy concluded that the litigation was the "functional equivalent of a quiet title action,"[37] designed to deny the State "substantially all benefits of ownership and control."[38] Finding the relief sought "fully as intrusive" as a retroactive levy of funds, he agreed with Idaho that the Eleventh Amendment allowed the State to "insist upon responding to [the] claims in its own courts ...."[39]

A partial concurrence authored by Justice O'Connor and joined by Justices Scalia and Thomas, however, took the position that *Young* required only "a straightforward inquiry into whether a complaint alleges an ongoing violation of

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[32] 521 U.S. at 270.

[33] *Id.* at 278, 280.

[34] *Id.* at 271.

[35] *Id.* at 277 (quoting *Papasan v. Allain*, 478 U.S. 265, 277 (1986)).

[36] *Id.* at 282, 280 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971)).

[37] *Id.* at 281.

[38] *Id.* at 282.

[39] *Id.* at 287-88.

federal law and seeks [prospective] relief."[40] Turning to the facts presented in *Coeur d'Alene*, the Justices agreed that the case involved the "functional equivalent of a quiet title action," designed to eliminate all "regulatory power" over the property.[41] As with the plurality, this was sufficient to distinguish the typical *Young* case seeking prospective, equitable relief and to justify the conclusion that "it simply cannot be said that the suit [was] not a suit against the State"[42] barred by the Eleventh Amendment.

The present case was originally litigated in state court as a quiet title action and subsequently refiled in federal court as a suit to "confirm and quiet" leasehold title. Six years later (and one year after *Coeur d'Alene* was decided), however, the complaint was amended. Although couched in language seeking a declaratory judgment that the "renewable forever" leases are valid, the relief is clearly "functionally equivalent" to that which was originally sought.

No substantive distinction exists between Idaho's loss of title to the land at issue in *Coeur d'Alene* and what is now at stake for the State of Mississippi when leases entered into on unconscionable terms are attacked. Specifically, as recognized by the Mississippi Supreme Court over a hundred years ago,[43] a decision upholding the "renewable forever" clause grants

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[40] *Id.* at 296 (O'Connor, J., concurring in part and concurring in the judgment).

[41] *Id.* at 289.

[42] *Id.* at 296 (O'Connor, J., concurring in part and concurring in the judgment).

[43] "Practically such leasehold interests are of value as great as the fee in the lands sold, and title vested in the purchasers, and practically such leaseholders have all that the owners in fee possess." *Street v. City of Columbus*, 23 So. 773, 774 (Miss. 1898).

rights identical to fee simple title. The lower court determined, however, that the State's authority to assert "police and taxing power" over Sixteenth Section land was sufficient to distinguish the "renewable forever" leases from the loss of all regulatory control at issue in *Coeur d'Alene*.[44] Thus, even though the purpose for which the land is dedicated—generation of additional funds for schools in a manner compatible with the "no donation" clause—is lost forever, the Eleventh Amendment defense was denied. This illogical holding adds another circuit to the conflict that exists on what interpretation is to be given the fragmented opinion in *Coeur d'Alene*.

The decision by the lower court to limit *Coeur d'Alene* to its facts is identical to the approach taken by the Ninth Circuit. In *Duke Energy Trading & Marketing, L.L.C. v. Davis*,[45] that court held that *Coeur d'Alene* was "limited to its 'particular and special circumstances.'"[46] Thus, the fact that the tribal lands in question were "not even within the regulatory

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[44] App. A at 8a.

[45] 267 F.3d 1042 (9th Cir. 2001).

[46] *Id.* at 1054 n.8 (quoting *Coeur d'Alene*, 521 U.S. at 287). Dissenting from the panel's majority, Judge Kozinski construed *Coeur d'Alene* "as creating an exception to *Ex parte Young* where the suit implicates the state's fundamental sovereign interests." *Id.* at 1059 (Kozinski, J., dissenting). "If *Coeur d'Alene* does not cover" a federal court's "interference with the state's essential sovereign interests, ... then it must apply only where Indian tribes challenge the state's title to submerged lands, and nowhere else. Unlike the majority, I cannot read *Coeur d'Alene* quite so narrowly." *Id.* (Kozinski, J., dissenting). *Compare AT&T Communications v. BellSouth Telecomms., Inc.*, 238 F.3d 636, 648 (5th Cir. 2001) (without citation to the opinion below, concluding that *Ex parte Young* remains unaffected by *Coeur d'Alene*).

jurisdiction"[47] was construed as the dispositive factor.

Four other circuits, however, construe *Coeur d'Alene* as having a much broader holding. In *MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania*,[48] the Third Circuit noted the existing "confusion [that] has arisen"[49] and construed *Coeur d'Alene* to apply "in those unique and special circumstances in which the suit against the state officer affects a unique or essential attribute of state sovereignty.[50] "[A] state's title, control, possession, and ownership of water and land, which is equivalent to its control over funds of the state treasury," is explained as but "[o]ne example" of this Court's holding.[51]

The Tenth Circuit interprets *Coeur d'Alene* as "impos[ing] a two-part inquiry": whether "special sovereignty interests" are at stake and whether "the requested relief is the functional equivalent "to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment.'"[52] Similarly, the Seventh Circuit interprets *Coeur*

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[47] *Id.* at 1052 (quoting *Coeur d'Alene*, 521 U.S. at 282). *See also Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000) ("unique divestiture of state's broad range of controls over its own lands" critical to *Coeur d'Alene* holding). *But cf. id.* ("question posed by *Coeur d'Alene* [is] whether the relief requested would be so much of a *divestiture* of the state's sovereignty as to render the suit as one *against the state itself*").

[48] 271 F.3d 491 (3d Cir. 2001).

[49] *Id.* at 506.

[50] *Id.* at 508.

[51] *Id.*

[52] *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1198 (10th Cir. 1998) (as corrected Jan. 8, 1999) (quoting *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998)). *See ANR Pipeline*, 150 F.3d at 1193-94

d'Alene to apply when either "core functions or fundamental powers"[53] of a State are at issue. And the Sixth Circuit has construed *Coeur d'Alene* to apply where the State "has a great interest in maintaining public access to the Great Lakes," noting that the petitioners' effort to have public property declared their own "was in some ways similar to a quiet title action" and thus governed by *Coeur d'Alene*.[54]

In addition to a conflict in circuits, this case also presents an important question of law that should be settled by this Court. The only substantive issues raised in *Coeur d'Alene* centered on the construction to be given a federal statute and an executive order. The significant federal interest, however, proved an insufficient basis upon which to deny the State of Idaho the Eleventh Amendment defense. In contrast, this case is steeped in issues of state law. The unresolved question, therefore, is whether this fact—in and of itself—warrants

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(state's "special and fundamental interest in its tax collection system" sufficient for dismissal of suit seeking injunction with respect to collection of taxes).

Thus, the lower court's reliance on Tenth Circuit precedent is misplaced. The case, *Elephant Butte Irrigation District. v. Department. of the Interior*, 160 F.3d 602 (10th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999), employed the "otherwise barred" test and, in contrast to the lower court's description, App. A. at 8a, does not involve analogous facts to those now at issue. Rather, in a dispute concerning appropriate distribution of profits from the lease of federal land to the State of New Mexico, the court without much difficulty concluded that a State's interests in a claim to profits (contested by a private party) was not the same type of "special sovereign interest[]" as was at issue in litigation to quiet title to disputed real property owned by the State. *Id.* at 612.

[53] *MCI Telecomm. Corp. v. Ill. Bell Tel.*, 222 F.3d 323, 348 (7th Cir. 2000).

[54] *Macdonald v. City of Northport*, 164 F.3d 964, 972 (6th Cir. 1999).

dismissal pursuant to the one proposition agreed upon by the five-Justice majority in *Coeur d'Alene*: the invocation of *Young* "must reflect a ... respect for state courts instead of a reflexive reliance on an obvious fiction." This question presents yet another issue warranting the grant of certiorari.

THE COURT OF APPEALS' APPLICATION OF THE CONTRACTS CLAUSE TO A PROVISION OF THE MISSISSIPPI CONSTITUTION NOT SPECIFICALLY WORDED TO IMPAIR CONTRACTUAL RIGHTS WITH RESPECT TO SIXTEENTH SECTION LAND IS IN DIRECT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

The lower court would construe the Contracts Clause to mean that a state is forever bound by agreements made at prices established almost two centuries ago and that now exist in violation of state statutes and the state constitution. A basic tenet of Contracts Clause jurisprudence, however, is that "[t]he operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future."[55] The Clause, therefore, "does not deprive States of their 'broad power to adopt general regulatory measures'" or deny the power to "impose[] a generally applicable rule of conduct designed to advance 'a broad societal interest.'"[56]

In the past forty-five years, this Court has decided only two cases directly involving a State's alleged violation of its

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[55] *Dillingham v. McLaughlin*, 264 U.S. 370, 374 (1924) (Holmes, J.) A State cannot, therefore, enter into binding contracts not to exercise its police power in the future. *Atlantic Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548 (1914); *Stone v. Mississippi*, 101 U.S. 814 (1879).

[56] *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 239 (1978)).

own contracts. Both arose from litigation based on the contention that the sole effect of a state law was to alter rights secured by specific contracts. *See United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (New York and New Jersey statutes written to repeal previous covenant the two states had entered into); *City of El Paso v. Simmons*, 379 U.S. 497 (1965) (Texas statute altering rights of purchasers of public lands to reinstate their interests by payment of delinquent interest).[57] In contrast, Section 95 of the 1890 Mississippi Constitution sets forth "a generally applicable rule of conduct," *i.e.*, "[l]ands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals." Devoid of any specific language designed to adversely affect previously statutorily-secured rights relating to Sixteenth Section land, this section of the Mississippi Constitution advances "a broad societal interest" and, therefore, is not subject to proscriptions imposed by the Contracts Clause. At no point in the lower court's belabored Contracts Clause analysis,[58] however, is there recognition of the basic distinction between laws of general applicability and those targeting specific contracts with the State. This fact represents a defect fatal to the court's finding of a Contracts Clause violation and plainly represents a decision in clear conflict with decisions of this Court.

Finally, although the lower court was careful to point

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[57] Cases involving alleged Contracts Clause violations by statutes interdicting rights secured by private contracts also arise in the wake of legislation directed to specific contracts. *See, e.g., Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400 (1983) (statute precluding use of price escalator clause in natural gas contracts); *Allied Structural Steel*, 438 U.S. at 239 (statute only applicable to certain employers with pension plan); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (statute altering rights secured by mortgages).

[58] App. A at 11a-32a.

out that Respondent's suit "seeks redress for an existing [legislative] harm,"[59] it supports this proposition by relying on the *Hill* decision.[60] This segment of the opinion places the lower court in direct conflict with decisions of this Court holding that the clear language of the Contracts Clause ("no State shall ... pass any ... Law impairing") is "directed only against impairment by legislation," not by court decisions. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924) (citing "a long line of decisions"). It also presents an analysis that conflicts with a previous circuit opinion that should have been, but was not, perceived as binding precedent.

In *Frazier v. Lowndes County Board of Education*,[61] a board of education, proceeding on the basis of a pre-*Hill* opinion of the attorney general on the effect of Section 95, notified a leaseholder that his lease on Sixteenth Section land was subject to renegotiation. Rejecting the leaseholder's Contracts Clause argument, the Fifth Circuit found the distinction between an attorney general's opinion and a court decision "a distinction without a difference,"[62] and concluded:

> [i]t must be kept in mind that Art. 1, sec. 10 of the Constitution is a prohibition only against the impairing of contract obligation by legislation. Such impairment as may be produced by judicial decision alone is not within its ban ....[63]

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[59] *Id.* at 6a.

[60] *Id.* at 12a n.34 (attempting to distinguish *Hill* on the basis that the decision "merely engaged in constitutional construction").

[61] 710 F.2d 1097 (5th Cir. 1983).

[62] *Id.* at 1100.

[63] *Id.*

The construction given the Contracts Clause by the lower court in the present case places the opinion in direct conflict with two clear lines of decisions by this Court. This fact, again, warrants the grant of certiorari.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
Fifth Circuit

J. Randolph LIPSCOMB,
on behalf of himself and all others similarly situated;
Mayor, City of Columbus;
City Council of the City of Columbus, Mississippi,
as the statutorily designated successors in office to
the Trustees of Franklin Academy,
Plaintiffs-Appellants,

v.

THE COLUMBUS MUNICIPAL
SEPARATE SCHOOL DISTRICT,
Dr. Reuben E. Dilworth, Superintendent; et al.,
Defendants,

THE COLUMBUS MUNICIPAL
SEPARATE SCHOOL DISTRICT,
Dr. Reuben E. Dilworth, Superintendent; et al.,
Defendants-Appellants,

v.

STATE of MISSISSIPPI, Eric Clark, Secretary of State;
United States Department of Housing and Urban
Development; Eric Clark, Secretary of State,
Defendants-Appellees.

No. 00-60245

October 3, 2001.

**Appeals from the United States District Court
for the Northern District of Mississippi.**

Before REYNALDO G. GARZA, HIGGINBOTHAM and SMITH, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case requires us to examine a collision between the Contract Clause of the United States Constitution and Mississippi's effort to escape rent and renewal terms of leases of sixteenth section land in Columbus, Mississippi dating back to the early nineteenth century. The Secretary of State of Mississippi and the State maintain that the rental and renewal terms are invalid because their perpetuation of rents that are now nominal violate a provision of the 1890 Mississippi Constitution forbidding the donation of public property to private parties. Lipscomb sues for a declaration that the efforts of the Secretary of State to invalidate these leases violates the Contract Clause. The district court held that invalidating the leases would violate the Contract Clause. We affirm.

I

Before Mississippi became a state, the United States Congress set aside the sixteenth section of every township in the Mississippi Territory to be used for the benefit of schools.[1] Congress then authorized the leasing of the sixteenth section land to raise funds to finance public schools in the Mississippi Territory.[2] Upon granting statehood to Mississippi in 1817, Congress gave the sixteenth section land to the new state for

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[1] Act of March 3, 1803, 2 Stat. 233-34. Sixteenth sections were not set aside in northern Mississippi until 1817, *see* Act of March 3, 1817, 3 Stat. 375, and "lieu lands" were provided for sixteenth sections that were unavailable for various reasons. *See, e.g.*, Act of July 4, 1836, 5 Stat. 116 (Chickasaw Cession Lieu Lands). The creation of sixteenth section lands and lieu lands is discussed in *Papasan v. Allain*, 478 U.S. 265, 268-73, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986).

[2] Act of Jan. 9, 1815, 3 Stat. 163 (providing for leasing certain lands reserved for the support of schools in the Mississippi territory).

the benefit of its schools.[3] Thereafter, the Mississippi legislature authorized the leasing of the school lands, the proceeds of which would finance public schools.[4]

During the nineteenth century, various persons leased sixteenth section land from the school board of Columbus, Mississippi. These leases were to last 99 years from February 10, 1821, or thereabouts (regardless of when actually made), and contained "renewable forever" provisions authorized by an 1830 Mississippi statute.[5] Many of the leases--often after being assigned or subdivided--were renewed in 1920 under their renewable forever provisions. The rental rates paid on the Columbus leases have remained unchanged for 180 years. Leaseholders of lots of property in downtown Columbus pay pennies in rent per year, a small fraction of their fair market rent.

In 1890, Mississippi ratified its current constitution. Section 95 of the 1890 constitution prohibits the donation of state lands to private parties.[6] Mississippi courts subsequently interpreted *section 95* to prohibit leases or sales of land for grossly inadequate consideration.[7] A lease that violates section 95 is voidable.[8] Following these rulings, the State and

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[3] *Papasan*, 478 U.S. at 271, 106 S.Ct. 2932.

[4] *See* Miss. Const. of 1817, art. 6, § 20; Act of Feb. 10, 1821, 1821 Miss. Laws, 4th Sess., Ch. XLVI (authorizing a lease of certain Town Lots therein named, and for other purposes).

[5] Act of Dec. 13, 1830, 1830 Miss. Laws, 14th Sess., Ch. II.

[6] Miss. Const. of 1890, art. 4, § 95 ("Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals, or to railroad companies.").

[7] *See, e.g., Hill v. Thompson*, 564 So.2d 1, 9 (Miss.1989).

[8] *Id.* at 12.

individual school boards began asserting that sixteenth section leases for nominal consideration were void and renegotiating the leases. The leases in Columbus, Mississippi, however, occupy a unique position: because the "renewable forever" leases in Columbus were signed before the ratification of the 1890 Mississippi Constitution, voiding the leases implicates the Contract Clause of the United States Constitution.[9]

J. Randolph Lipscomb brought a declaratory judgment action in federal court seeking certification of a class of leaseholders and a declaration that the State's threatened action to void the leases and renegotiate would violate the Contract Clause. He originally named the Secretary of State of Mississippi, the State of Mississippi, the Columbus School Board, and the U.S. Department of Housing and Urban Development[10] as defendants.[11]

The district court certified the class, but then abstained under the *Pullman* and *Burford* doctrines. This Court reversed the ruling on abstention and remanded.[12] The district court redefined the class and ultimately granted summary judgment in favor of Lipscomb, declaring, in relevant part, that (1) "renewable forever" in the Columbus sixteenth section leases

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[9] U.S. Const. Art. I, § 10, cl. 1.

[10] Lipscomb alleged that in response to the State's declared intention to void the leases, HUD had declared the leased lands "uninsurable," thereby causing the leaseholders harm.

[11] The School District has since been realigned as a plaintiff, and HUD remains only as a "nominal" defendant. We will refer here often to the remaining defendants collectively as the State.

[12] *See Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 145 F.3d 238, 240-42 (5th Cir. 1998) (*Lipscomb I*). The broader history of the leasing of state lands for the benefit of schools is discussed below, in the context of the Contract Clause analysis. *See* Part IV.A.

means all rental covenants, including the lease rate, are renewable forever, (2) the Contract Clause of the United States Constitution applies to the leases in this case, and (3) voiding the leases under section 95 of the Mississippi Constitution would violate the Contract Clause. The Secretary of State and the State of Mississippi appeal that ruling.

II

The State challenges federal jurisdiction on several grounds, and we turn first to that question.

A. Subject Matter Jurisdiction

The State argues that the district court lacked subject matter jurisdiction because there is no federal question and the federal defendant, HUD, has no case or controversy with the plaintiffs.[13] Specifically, the State claims that the Supreme Court's decision in *Public Service Commission v. Wycoff*[14]

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[13] The State contends that the leases are in fact taxes, and thus the federal courts are barred by the Tax Injunction Act, 28 U.S.C. § 1341, from entertaining a challenge to the State's actions to collect on the leases. This contention is without merit. The lease obligations are a creature of contract, not a mandatory obligation imposed by the state as taxes are. *See New Jersey v. Anderson*, 203 U.S. 483, 492, 27 S.Ct. 137, 51 L.Ed. 284 (1906). Although the determination of what is a "tax" is ultimately a question of federal law, *Neinast v. State of Texas*, 217 F.3d 275, 278 (5th Cir.2000), we note that the Mississippi Supreme Court has characterized the leases as leases rather than taxes. *See Street v. City of Columbus*, 75 Miss. 822, 23 So. 773, 774 (1898). The appellants also note that the lease payments are collected by the taxing authorities. This court has previously rejected this reasoning: "This formalism is unhelpful.... [T]he question is not where the money is deposited, but the purpose of the assessment." *Neinast*, 217 F.3d at 278.

[14] 344 U.S. 237, 248, 73 S.Ct. 236, 97 L.Ed. 291 (1952).

precludes federal jurisdiction under 28 U.S.C. 1331 and the well-pleaded complaint rule.[15] We disagree.

In *Wycoff*, the plaintiffs sought a declaratory judgment that their activities constituted interstate commerce so as to insulate them from state regulation. The Court held that, when "the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court."[16] The State contends that Lipscomb has similarly attempted to evade the well-pleaded complaint rule, by anticipating the Secretary of State's judicial action. Since the state legislative action giving rise to Lipscomb's claim is the Mississippi Constitution of 1890, Lipscomb's complaint does not anticipate a state judicial action, it seeks redress for an existing harm.[17] To the point, the threatened action is legislative impairment of contract.

B. Eleventh Amendment Immunity

The State for the first time seeks a dismissal on grounds of sovereign immunity. Lipscomb counters that the State has waived its Eleventh Amendment immunity and, in the alternative, that *Ex parte Young*[18] saves the claim for declaratory relief against the Secretary of State, even if the State of Mississippi must be dismissed. We address these contentions in reverse order.

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[15] *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

[16] *Wycoff*, 344 U.S. at 248, 73 S.Ct. 236.

[17] *See* infra note 34

[18] 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Ex parte Young of course offers an exception to the State's Eleventh Amendment immunity. That is, state immunity is no bar to enjoining a proper state official from unconstitutional acts. Lipscomb seeks not damages but a declaration that voiding the leases would violate the Contract Clause. In function, this requested relief is indistinguishable from a suit to enjoin the Secretary from declining to abide the challenged lease terms. While such a declaration will not support coercive, retrospective relief or money damages when confronted with the Eleventh Amendment, it will support injunctive relief.

The Secretary of State argues, however, that the suit implicates the State's ownership of land in a manner that takes it outside the *Ex parte Young* exception, as in *Idaho v. Coeur d'Alene Tribe of Idaho.*[19] In *Coeur d'Alene*, the Supreme Court held that a claim to the ownership of submerged waters brought against the State is barred by the Eleventh Amendment, even though no damages were sought. The Court emphasized that the requested declaration would strip the State of its jurisdiction and regulatory control over the lands.[20] The Court also noted that state control over submerged lands was a special incident of sovereignty with deep historical roots.[21]

We are not persuaded that *Coeur d'Alene* controls here. The Supreme Court relied on two interrelated factors: First, the Court noted that the Eleventh Amendment bars a quiet title action in federal court absent the State's consent.[22] The Tribe claimed ownership and exclusive occupancy of the lands and was seeking invalidation of all state laws regulating the land.

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19 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

20 *Id.* at 281-83, 117 S.Ct. 2028.

21 *Id.* at 282-87, 117 S.Ct. 2028.

22 *Id.* at 281-82, 117 S.Ct. 2028.

It conceded that its suit was the functional equivalent of a quiet title action. Second, the Court emphasized that the relief sought would have been an affront to the State's sovereignty. Because the Tribe was a distinct sovereign, not only would quieting title in the Tribe divest the State of ownership over the land, it would strip the State of all of its jurisdiction and power over the land.[23]

We find our case distinguishable. Lipscomb did originally seek to quiet title, but he abandoned that claim. His amended complaint seeks only a declaration that the invalidation of the price terms of the leases is prohibited by the Contract Clause of the Constitution. The contention that the requested relief would be an affront to state sovereignty is not convincing. Mississippi would retain jurisdiction over the leased lands; indeed, title to the lands would remain in Mississippi. The State's basic police and taxing power would not be affected.

The Tenth Circuit found similar distinctions from *Coeur d'Alene* in a case resembling this one. In *Elephant Butte Irrigation District of New Mexico v. Department of Interior,*[24] it denied an Eleventh Amendment challenge to a suit over the distribution of profits from land leases to various governmental bodies. The court acknowledged that the suit involved property interests of the State, but noted that it was not a suit to quiet title, and the "special sovereignty interests" present in

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[23] *Id.* at 282, 117 S.Ct. 2028 ("[T]he far-reaching and invasive relief the Tribe seeks ... go[es] well beyond the typical stakes in a real property quiet title action."). The majority opinion treated these two factors in tandem. Justice O'Connor's concurring opinion distinguishes these factors and discusses them at greater length. *See id.* at 288-91, 117 S.Ct. 2028 (O'Connor, J., concurring).

[24] 160 F.3d 602 (10th Cir.1998).

Coeur d'Alene did not exist.[25] Instead, the Tenth Circuit noted, the only interest of the State at stake was its relatively mundane interest in the distribution of lease income.[26]

In sum, Lipscomb's suit is not to quiet title, nor would the granting of relief strip the State of any of its jurisdiction or authority to regulate the land. While it would prevent the State from charging current market rates for rent on renewal, it does nothing to frustrate state taxation of the leasehold-- a reality to which we will return. As such, the *Ex parte Young* doctrine applies, and the Eleventh Amendment does not deprive federal courts of jurisdiction to entertain this suit against the Secretary of State. This renders moot the claim for the same relief asserted directly against the State, and we need not address that claim further.

III

Before turning to the question of whether the Contract Clause bars invalidation of the lease terms, we must examine a preliminary question of whether refusing to honor the renewal and price terms implicates the Contract Clause at all. The alleged violation of the Contract Clause rests on the assertion that the current leases were in place before the 1890 Mississippi Constitution. The Secretary argues that renewals of the leases in 1920 changed the contract terms to the extent that they were new contracts rather than renewals. The Secretary's argument is that the price terms on the contracts have changed--that the contracts were altered, not merely renewed. If so, the Secretary concludes, there can be no Contract Clause violation, because the plaintiffs do not hold leases with price terms that preexisted the 1890 Mississippi Constitution.

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[25] *Id.* at 608-09, 611-12.

[26] *See id.* at 612.

Lipscomb replies that changes in the price terms reflected subdivision of the land, and lower price terms for contracts for smaller plots represented pro rata division of the original lease price.[27] Lipscomb also notes that the leases were labeled "renewals" and thus we may conclude that they were in fact renewals.

We agree with the district court that the defendants failed to create a genuine issue of material fact on this issue. Lipscomb presented evidence that the leases were labeled "renewals." This view is consistent with the 1830 statute that authorized the trustees of Franklin Academy to make all the leases at issue in this case renewable forever.[28] Further, although the leases were divided and re-divided, increasing the difficulty of determining whether their rents changed over time, Lipscomb presented evidence that the aggregate rentals

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[27] A state statute allowed lessees to subdivide their leases. Act of January 28, 1846, 1846 Miss. Laws, Ch. CXLIII.

[28] Act of Dec. 13, 1830, 1830 Miss. Laws, 14th Sess., Ch. II. The State claims that this statute only authorized the creation of leases that were renewable forever and that it did not make previously created leases renewable forever or allow those leases to be terminated and then renegotiated with renewable forever provisions. The State argues that the statute provides that the only way a prior lease can be renewed forever is at the end of its lease term. The State misreads the statute. It states: "*And be it further enacted,* That the Trustees of said Franklin Academy ... be, and are hereby authorized to make out all leases for the lots of [sixteenth section land in Columbus], for ninety nine years, dating from the first leasing of lots in said town of Columbus, renewable forever.... *[A]nd that all leases heretofore made of lots, by the said Trustees, be renewable at the expiration of the time for which they were leased, in like manner as above, provided for, in cases of lots to be leased hereafter.*" *Id.* (emphasis added). The statute is silent on the surrender or termination of pre-existing leases. As the defendants note, the statute may well have induced holders of pre-1830 leases to surrender them, so as to gain the benefits of the renewable forever provisions that were now authorized. The simple fact remains that the leases here at issue contain renewable forever terms authorized by this statute.

on the lands in question did not change before and after 1920. The State responded only with evidence that the per-acre rents changed over time. This is not relevant, since allocation of rentals on sub- divided pieces of leased land could rest on the quality of each lot rather than its area. For example, a two-acre lot rented for $2.00 a year could be divided into two one-acre lots, one of which rented for $1.20 and one of which rented for $0.80. Even though the rent-per-acre went up in one lot and down in the other, the rental rate of two dollars for two acres did not change. The difference in rent between the two lots could reflect the value of each lot's location, the quality of its soil, access to water or roads, or other differences. The precise reasons for such differences in valuation are irrelevant. The State thus has failed to create a genuine issue of material fact that subdividing or releasing lands changed their rental rates. We accept the district court's conclusion that the 1920 leases were renewals and at last reach the question of the limits imposed by the Contract Clause.

IV

A

The 1890 Mississippi Constitution, section 95, states, "Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals, or to railroad companies."[29] Mississippi courts have consistently construed this to forbid transactions for consideration so inadequate that they are the equivalent of donations.[30] The Mississippi Supreme Court, in *Hill v. Thompson*,[31] held that a sale or lease of sixteenth section land

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[29] Miss. Const. of 1890, art. 4, § 95.

[30] *See, e.g., Hill*, 564 So.2d at 9 (reviewing cases).

[31] 564 So.2d 1 (Miss.1989).

that violates section 95 is voidable.[32] However, the Mississippi Supreme Court, in interpreting section 95 to make certain sixteenth section land leases voidable, invoked equity and held that, even when a lease is voided, the leaseholder retains the right of first refusal after the land is appraised for fair rental value.[33]

In sum, the Secretary of State has sought, under section 95, the invalidation of leases of sixteenth section lands throughout Mississippi. The sixteenth section land leases in Columbus, Mississippi, however, are renewals of leases signed before the ratification of section 95 of the 1890 Mississippi Constitution. Thus, Lipscomb argues for a declaration that this effort to invalidate the leases in Columbus violates the Contract Clause of the United States Constitution.

B

Article I, section 10 of the Constitution states, "No State shall ... pass any ... Law impairing the Obligation of Contracts...."[34] The Supreme Court has emphasized, however,

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[32] *See id.* at 9.

[33] *See id.* at 12.

[34] U.S. Const. Art. I, § 10, cl. 1. The defendants argue that the Contract Clause is not implicated by this lawsuit because the alleged impairment of the leases was not caused by the legislative act of enacting the 1890 Mississippi Constitution, but by the judicial act of the Supreme Court of Mississippi in deciding *Hill*. The defendants are correct in claiming that only legislative actions, not judicial actions, can create a viable Contract Clause claim. *See Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451, 44 S.Ct. 197, 68 L.Ed. 382 (1924); *Frazier v. Lowndes County, Mississippi, Bd. of Educ.*, 710 F.2d 1097, 1099 (5th Cir.1983). But the impairment stems from the "no donations" clause of the 1890 Mississippi Constitution that the *Hill* court interpreted, not from the *Hill* decision itself, which merely engaged in constitutional construction. Our prior opinion in *Lipscomb* said as much. *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 145 F.3d 238, 243 n. 4 (5th Cir.1998).

that the absolute language of the Contract Clause does not create an absolute prohibition; a State must be given some accommodation in passing laws "to safeguard the vital interests of its people."[35] The Supreme Court has developed a three-part test to balance the State's obligation not to impair contracts with the State's interest in public welfare. This test is applied against the backdrop of legislative power to exercise eminent domain. That a state legislature has by statute given assurance that it would not do so does not mean that the legislature cannot later take the property by eminent domain or paying just compensation.[36] That is, we address a claim of police power to regulate--without compensation. And while impairment of contract analysis has an air of due process about it, our analysis is distinct.

First, "[t]he threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."[37] In considering whether an impairment to contract is substantial, the court should consider the expectations of the parties with respect to changes in the law.[38] Particularly relevant to this inquiry is whether the subject matter of the contracts had been subject to regulation at the time the contracts were made.[39] A "regulation that restricts a party to gains it reasonably expected from the contract does not

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[35] *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983).

[36] *See West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848).

[37] *Id.* at 411, 103 S.Ct. 697 (internal quotations omitted).

[38] *See Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir.1998).

[39] *See Energy Reserves Group*, 459 U.S. at 410, 103 S.Ct. 697.

necessarily constitute substantial impairment."[40] The court should also consider what terms of the contract are affected and the duration of the effects.[41]

Second, if we find a substantial impairment of contractual rights, we must consider the justification offered by the State for its impairment of the contract.[42] A State can only justify a substantial impairment of contracts with a "significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem."[43] The problem need not be "an emergency or temporary situation,"[44] and "the elimination of unforeseen windfall profits" is a legitimate state interest sufficient to justify state impairment of contracts.[45] The requirement that the problem be "broad and general" ensures "that the State is exercising its police power, rather than providing a benefit to special interests."[46] The scrutiny to which the court subjects the state law is proportional to the degree of impairment.[47]

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[40] *Id.*

[41] *Cf. Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245-47, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) (describing example of a severe impairment of contractual rights).

[42] *See Energy Reserves Group*, 459 U.S. at 411, 103 S.Ct. 697.

[43] *Id.* at 411-12, 103 S.Ct. 697.

[44] *Id.* at 412, 103 S.Ct. 697.

[45] *Id.*

[46] *Id.*.

[47] See *Spannaus*, 438 U.S. at 234, 98 S.Ct. 2716 ("The severity of the impairment measures the height of the hurdle the state legislation must clear."). In Spannaus, the Supreme Court noted that the challenged legislation "worked a severe, permanent, and immediate change in [the

Third, if the State presents a legitimate justification for the impairment, we determine whether the impairment is reasonable and necessary. "Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."[48] In cases involving impairment of contracts between private parties, the court does not independently review the reasonableness of the legislation; it should defer to the judgment of the legislature.[49]

However, when the State is a party to the contracts, the court cannot defer to the State because the State's self-interest as a party is implicated.[50] Instead, the court must engage in a two-part inquiry. First, the court should determine whether the contracts surrender "an essential attribute of [the State's] sovereignty."[51] If so, the Contract Clause does not prevent the State from impairing such an obligation, because "the legislature cannot bargain away the police power of a State."[52] Purely financial obligations, however, do not surrender aspects of the State's sovereignty, and thus are subject to the Contract

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contractual] relationships--irrevocably and retroactively." *Id.* at 250, 98 S.Ct. 2716. The Court had little hesitation in striking down such legislation when it (1) interfered with a previously unregulated field, (2) was directed at a small subset of employers, rather than business in general, and (3) did not even purport to be a necessary step in remedying a social or economic problem. *See id.* at 247-50, 98 S.Ct. 2716.

[48] *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977); *see also Energy Reserves Group*, 459 U.S. at 412, 103 S.Ct. 697.

[49] *Energy Reserves Group*, 459 U.S. at 412, 103 S.Ct. 697.

[50] *United States Trust Co.*, 431 U.S. at 25-26, 97 S.Ct. 1505.

[51] *Id.* at 23, 97 S.Ct. 1505.

[52] *Id.*

Clause.[53] Second, even if the impairment is subject to the Contract Clause, the court must determine whether the impairment is "reasonable and necessary," without giving "complete deference" to the legislature's judgment.[54]

In sum, the court must first determine whether the impairment of the contract is substantial and the degree of that impairment. If the impairment is not substantial, there is no claim under the Contract Clause.[55] The court must next assess the strength of the State's justification for the impairment. The justification must identify a public purpose that is significant and legitimate. If the State fails to provide such a justification, the impairment violates the Contract Clause.[56] Finally, the court must compare the impairment and the justification to determine whether the impairment is "reasonable and necessary." The degree of deference shown the legislature's judgment on this question depends on whether the government has impaired contracts to which it is a party.

C

We begin by asking whether section 95 substantially impairs the contractual rights of the leaseholders. To determine the effect of a law on a contract, we must identify which contractual rights are being affected by the law, and then consider the extent to which the law has contravened the

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[53] *See id.* The Supreme Court has held that "any substantial alteration by subsequent legislation of the rights of a purchaser at a tax sale, accruing to him under laws in force at the time of his purchase, is void as impairing the obligation of contract." *Wood v. Lovett*, 313 U.S. 362, 369, 61 S.Ct. 983, 85 L.Ed. 1404 (1941).

[54] *United States Trust Co.*, 431 U.S. at 25-26, 97 S.Ct. 1505.

[55] *See, e.g., City of El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965). This case is discussed at length in Part IV.E.

[56] *See, e.g., Spannaus*, 438 U.S. at 234, 98 S.Ct. 2716.

reasonable expectations of the parties. Section 95 affects the renewal rent term. As read by the Mississippi Supreme Court section 95 makes voidable the current lease price, allowing the State to seek a fair market rate, but giving the current leaseholder the right of first refusal.[57] The actual impairment to the leases is the invalidation of the "renewable forever" clauses that guaranteed a continuation of the original price term to the present day. Section 95 thus impairs the contract term that freezes the rents at prices that the State contends have become grossly inadequate with the passage of time.

Given that section 95 affects the renewal price term, we must ask what the reasonable expectations of the contracting parties were with respect to that contract term. The renewable forever clauses are authorized by state statute.[58] Additionally, the leases were made in furtherance of the State's duty to preserve the value of the school trust lands. The leases in this case were signed in the 1820s, 1830s, and 1840s, against a backdrop of the State's binding trust obligations.

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[57] Because the Mississippi Supreme Court has held that the leases are voidable, rather than void, the State has no right to seek foregone rent from past years. *See Hill*, 564 So.2d at 9.

[58] The Mississippi legislature passed numerous statutes regulating the leasing of sixteenth section land in the years after the creation of the State. Legislation in 1821 and 1830 authorized the leases in this case. *See* Miss. Const. of 1817, art. 6, § 20; Act of Feb. 10, 1821, 1821 Miss. Laws, 4th Sess., Ch. XLVI; Act of Dec. 13, 1830, 1830 Miss. Laws, 14th Sess., Ch. II. The Mississippi legislature altered the regulation of Mississippi sixteenth section lands throughout the 19th century. *See, e.g.*, Act of Feb. 10, 1830, 1830 Miss. Laws, Ch. XXIV; Act of December 16, 1830, 1830 Miss. Laws, 14th Sess., Ch. II. Indeed, since the nineteenth century, the Mississippi legislature has continued to place a great importance on the management of sixteenth section lands. *See* Act of March 20, 1914, 1914 Miss. Laws, Ch. CDLXII.

D

The nature of the trust is here relevant in two ways: first, the extent of the State's trust obligations in the management of the sixteenth section lands affects the strength of Mississippi's interest in regulating those lands; second and relatedly, the fetters of trust obligations bear on the reasonable expectations of the parties to the leases on their execution--the strength of the facially unqualified obligation to renew.

Since its earliest days, Mississippi has held sixteenth section lands in trust for the benefit of the schools of the State. Although courts often refer to "the" trust, there are in fact two trusts--one state, one federal--in which Mississippi holds its sixteenth section lands. Detailing this duality is necessary to understanding Mississippi's trust obligation. We turn first to the federal trust.

Beginning with the Northwest Territory in 1785, Congress set aside public lands in most of the territories of the United States to be used for the benefit of territorial schools. The lands set aside were composed of the sixteenth section of each township; in later years, additional sections were set aside as well. As states were formed out of territories, Congress, in the enabling act of each new state, granted the school lands to the state.[59] These grants contain language that the land is being given to the state for the benefit of its schools. This is the source of the claim that the states hold the school lands in a federally created trust.[60]

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[59] Thus, almost every state aside from the original thirteen has sixteenth section lands. *See Andrus v. Utah*, 446 U.S. 500, 522, 100 S.Ct. 1803, 64 L.Ed.2d 458 (1980) (Powell, J., dissenting); *see also* P. Gates, *History of Public Land Law Development* 287-88 (1968).

[60] For a more extensive discussion of the history of sixteenth section lands, see *Papasan*, 478 U.S. at 268-70, 106 S.Ct. 2932; *Andrus*, 446 U.S. at 522-24, 100 S.Ct. 1803 (Powell, J., dissenting); Semmes Luckett,

In defining the character of any federal trust, we then first turn to the language of the statute granting the sixteenth section lands to the State and their interpretation. Earlier grants of sixteenth section land did not contain any language creating specific obligations on the part of the states.[61] The Supreme Court long ago held that such grants gave the sixteenth section lands to the states in fee simple;[62] the federal trust was purely honorary.[63] Some later land grants – those to Arizona and New Mexico, for example – were worded to create very specific rights and duties of the United States and the state.[64] The Supreme Court has treated these grants as binding trusts.[65]

Mississippi's Sixteenth Section School Lands, 23 Miss. L.J. 281 (1962).

[61] *See, e.g.,* Act of March 3, 1817, 3 Stat. 375 ("[S]ection No. 16, in each township, [ ] shall be reserved for the support of schools therein.") (Mississippi enabling act); Act of Feb. 14, 1859, 11 Stat. 383 ("[S]ections numbered sixteen and thirty-six in every township of public lands ... shall be granted to said State for the use of schools.") (Oregon enabling act).

[62] *Cooper v. Roberts,* 59 U.S. 173, 181-82, 18 How. 173, 15 L.Ed. 338 (1855).

[63] *See Alabama v. Schmidt,* 232 U.S. 168, 173-74, 34 S.Ct. 301, 58 L.Ed. 555 (1914). The Fifth Circuit long ago held that the statute creating Louisiana's sixteenth section land, Act of March 3, 1811, 2 Stat. 662 (the sixteenth section "shall be reserved in each township, for the support of the schools within the same"), created only an honorary trust. *See Louisiana v. William T. Joyce Co.,* 261 F. 128, 130, 133 (5th Cir.1919).

[64] *See Lassen v. Arizona ex rel. Arizona Highway Dept.,* 385 U.S. 458, 470-74, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967) (reprinting statutory language of the land grants).

[65] *See id.* at 460-61, 466-67, 87 S.Ct. 584; *see also Papasan,* 478 U.S. at 270, 106 S.Ct. 2932 ("[T]he most recent grants are phrased not as outright gifts to the state for specific use but instead as express trusts.").

The grant of sixteenth section land to Mississippi was one of the earliest trusts created, and contained no language establishing a binding trust. We remain convinced then that the federal trust in which Mississippi holds its sixteenth section lands is purely honorary and that Mississippi holds absolute title to the land without federal restriction.[66] We now turn to the matter of trust obligations imposed by the law of Mississippi.

"An overwhelming body of law"[67] in Mississippi holds that the lands are held in a binding trust.[68] The Mississippi Supreme Court has said the trust dates back to the creation of the state.[69] Although the source of this trust obligation is

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[66] *Madison County Bd. of Educ. v. Illinois Central R.R. Co.*, 939 F.2d 292, 305 (5th Cir.1991).

[67] *Morrow v. Vinson*, 666 So.2d 802,805 (Miss.1995); *see also Mississippi Gaming Comm'n v. Bd. of Educ.*, 691 So.2d 452, 461 (Miss.1997).

[68] *See Morrow*, 666 So.2d at 805-06; *Hill v. Thompson*, 564 So.2d 1, 7 (Miss.1989); *Turney v. Marion County Bd. of Educ.*, 481 So.2d 770, 776-77 (Miss.1985); *Bragg v. Carter*, 367 So.2d 165, 167 (Miss.1978); *Tally v. Board of Supervisors*, 323 So.2d 547, 549-50 (Miss.1975); *Edwards v. Harper*, 321 So.2d 301, 303 (Miss.1975); *Holmes v. Jones*, 318 So.2d 865, 868 (Miss.1975); *Keys v. Carter*, 318 So.2d 862, 864 (Miss.1975); *State ex rel. Coleman v. Dear*, 212 Miss. 620, 55 So.2d 370, 373-74 (1951); *Koonce v. Bd. of Supervisors*, 202 Miss. 473, 32 So.2d 264, 265-66 (1947); *Pace v. State ex rel. Rice*, 191 Miss. 780, 4 So.2d 270, 272, 274, 276 (1941); *Washington County v. Riverside Drainage Dist.*, 159 Miss. 102, 131 So. 644, 645 (1931); *Jefferson Davis County v. James-Sumrall Lumber Co.*, 94 Miss. 530, 49 So. 611, 612 (1909).

[69] *See Hill*, 564 So.2d at 7. One case, *Pace v. State ex rel. Rice*, 191 Miss. 780, 4 So.2d 270, 272, 274, 276 (1941), has applied the trust obligation to a lease beginning in 1847. The court stated that "the state cannot abdicate its duty as trustee of property in which the whole people are interested, any more than it can surrender its police powers...." *Id.* at 277.

obscure,[70] the Mississippi Supreme Court has declared its existence as a matter of state law,[71] and that is the end of the matter.[72]

The State holds title to the land for the benefit of its schools; the common law rules applicable to private trusts

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[70] Some cases suggest that the obligation is a creature of state statute. *See Broadhead v. Bonita Lakes Mall, Ltd. Partnership*, 702 So.2d 92, 105 (Miss.1997); *Holmes v. Jones*, 318 So.2d 865, 868-69 (Miss.1975). Other cases appeal to the Mississippi Constitution of 1890, *see Morrow*, 666 So.2d at 805-06; *Koonce*, 202 Miss. 473, 32 So.2d at 265-66, or the public trust doctrine, *see Secretary of State v. Wiesenberg*, 633 So.2d 983, 987 (Miss.1994); *Cinque Bambini P'ship v. State*, 491 So.2d 508, 511 (Miss.1986).

[71] In addition to the state-law sources of the trust cited above, a few cases suggest that the trust is a federally enforceable creation of Congress, *See Hill*, 564 So.2d at 6; *Turney v. Marion County Bd. of Educ.*, 481 So.2d 770, 776 (Miss.1985). Since the Mississippi Supreme Court has adhered to *Hill* in the face of federal precedent reaffirming that the federal trust is honorary, however, it is clear that the binding trust is grounded in state law. *See Morrow*, 666 So.2d at 805.

[72] "[W]e interpret the state statute the way we believe the state Supreme Court would, based on prior precedent, legislation, and relevant commentary." *Vielma v. Eureka Co.*, 218 F.3d 458, 461 (5th Cir.2000). Of course, the significance of this trust to the Contract Clause is a question of federal law. We note that an earlier Fifth Circuit case, *Madison County Bd. of Ed. v. Illinois Central Railroad Co.*, 939 F.2d 292, 305-06 (5th Cir.1991), had held that Mississippi state law created no binding trust obligation for sixteenth section lands. This holding was superseded by the Mississippi Supreme Court's decision in *Morrow*, 666 So.2d at 805. In any case, the narrow holding of *Madison County*, that no trust obligation prevented the sale of sixteenth section land in 1882, remains good law; the Mississippi Supreme Court has held that the trust, as modified by the state constitution, did not prevent the sale of sixteenth section land between 1869 and 1890. *See Lambert v. State*, 211 Miss. 129, 51 So.2d 201, 203 (1951). We in no way question the validity of sales of sixteenth section land made prior to 1890.

apply to the trust in which Mississippi holds its school lands.[73] and any action taken by the State in violation of this trust is voidable.[74] The Mississippi Supreme Court has stated that the State's trust obligations are the equivalent of its police powers, and cannot be contracted away.[75] The exact requirements of the trust have been narrowed at times by statute and state

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[73] *See Hill v. Thompson*, 564 So.2d 1, 6 (Miss.1989).

[74] *See Secretary of State v. Wiesenberg*, 633 So.2d 983, 987 (Miss.1994) ("Since [1817], the common law of this State has adhered to the doctrine of public trust, applying it in both sixteenth section lands as well as tidelands."); *Cinque Bambini*, 491 So.2d at 511 (describing the State's tidelands and navigable waters and the sixteenth section lands as "two great public trusts"); *Pace*, 4 So.2d at 276-77. That grants of land held in public trust are revocable is discussed in *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 453-54, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). *See also* 63C Am.Jur.2d Public Lands § 7 (1997). Courts also note that common law rules applying to trusts also apply to the maintenance of the sixteenth section lands trust. *Hill*, 564 So.2d at 6, 9; *Bragg*, 367 So.2d at 167. Even contracts made in good faith are voidable if violating the trust. *See State ex rel. Kyle v. Dear*, 209 Miss. 268, 46 So.2d 100, 105 (1950); *Koonce v. Bd. of Supervisors*, 202 Miss. 473, 32 So.2d 264, 265-66 (1947).

[75] *State ex rel. Coleman v. Dear*, 212 Miss. 620, 55 So.2d 370, 373-74 (1951); *Pace*, 191 Miss. 780, 4 So.2d at 276.

constitution,[76] but the binding nature of the obligation has existed since 1817.[77]

When the leases were signed more than 100 years ago, the parties did not have the benefit of the body of law on school lands trusts that we have today. The relevant inquiry here is into the trust obligations that were the backdrop to the execution of the leases. We must repair then to the understanding of the trust at that time in order to assess what the parties to the original leases reasonably expected the State's duties and powers with respect to the land were. While the parties would undoubtedly have understood that the leases were being signed subject to some sort of a binding trust obligation, the source of the trust obligations was far less clear then than now.

At the same time the leases were signed, there was warrant for believing that any trust was federal. It was generally believed in Mississippi that the Mississippi legislature did not have the authority to sell sixteenth section land until Congress

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[76] Elements of this trust are embodied in the Mississippi Constitution of 1890. *See* Miss. Const. of 1890, art. 4, § 95 (forbidding the donation of public lands to private parties); Miss. Const. of 1890, art. 8, § 211 (governing the legislature's regulation of sixteenth section lands). The Mississippi Supreme Court has noted that the Mississippi legislature has discretion in executing its obligations under the trust, at least between 1869 and 1890. *See Lambert*, 51 So.2d at 203. *Lambert* involved a lease made under the Mississippi Constitution of 1869, which, unlike the Constitution of 1890, placed no express limitation upon the alienation of sixteenth section lands.

[77] *See Hill*, 564 So.2d at 7. The Mississippi Supreme Court in *Hill* emphasized that section 95 of the 1890 Constitution did not create the state law trust obligation, but merely made it "more concrete." *Id.*

passed a law authorizing its sale in Mississippi in 1852.[78] Indeed, Congress regularly passed laws altering states' control over sixteenth section land prior to 1852.[79] For virtually all of the nineteenth century, the Mississippi Supreme Court labored under the belief that the United States did not transfer title to the lands to Mississippi until 1852.[80]

Thus, the concept of a state law trust obligation was then perceived to be weaker. The Mississippi Constitution of 1817 contained a provision that appeared to create a trust obligation, and the Mississippi legislature regularly passed statutes

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[78] *See* Act of May 19, 1852, 10 Stat. 6. In 1829, the Mississippi legislature petitioned the U.S. Congress for authority to sell sixteenth section land. *See* Memorial of Feb. 5, 1829, 1829 Miss. Laws Ch. CI.

[79] *See* Act of Feb. 1, 1826, 4 Stat. 138 (authorizing the legislature of the state of Ohio to sell the lands heretofore appropriated for the use of schools in that state); Act of March 2, 1827, 4 Stat. 237 (Alabama); Act of May 24, 1828, 4 Stat. 298 (Indiana); Act of Feb. 15, 1843, 5 Stat. 600 (Illinois, Arkansas, Louisiana, and Tennessee).

[80] *Hester v. Crisler*, 36 Miss. 681, 1859 WL 3619, *2 (Miss.Err. & App.1859), held that the United States held title to Mississippi's sixteenth section lands until the passage of a federal statute in 1852. Before then, the court held, the State had no authority over the lands. In 1895, the Mississippi Supreme Court recognized that its decision was contrary to the weight of authority and reversed *Hester*. *See Jones v. Madison County*, 72 Miss. 777, 18 So. 87, 92 (1895). *See Cooper v. Roberts*, 59 U.S. 173, 181-82, 18 How. 173, 15 L.Ed. 338 (1855) (holding that the grant of sixteenth section land to Michigan, which was virtually identical to the Mississippi grant, created only an honorary trust). *Street*, 75 Miss. 822, 23 So. at 773 (1898) (expressing the view that Mississippi took title to lands when it was admitted into the union). An 1841 Mississippi case did not reach the question of the nature of the trust but suggested that Mississippi did have authority over the lands. *See Connell v. Woodward*, 6 Miss. 665, 1841 WL 1865, *5 (Miss.Err. & App.1841).

regulating the leasing of sixteenth section land.[81] The Mississippi Constitution of 1832, however, did not contain such a provision, stating only that "[a]ll laws now in force in this State, not repugnant to this Constitution, shall continue to operate."[82]

Lipscomb appeals to our prior opinion in this case, which stated that "the trust under which Mississippi operated at best created an honorary, not a mandatory, obligation on the part of the state to administer the lands for the benefit of schoolchildren."[83] This statement responded to the State's argument that the 1830 statute authorizing the "renewable forever" clauses violated the State's trust obligations. Lipscomb argues that the law of the case doctrine requires that we reject the appellants arguments that the State is bound by its trust obligation to maximize the value of the sixteenth section lands.

As should be clear, Mississippi's sixteenth section lands are held in two trusts: one state, one federal. Our prior opinion did not address the existence of a state-law trust obligation and relied only on federal law in reaching its conclusion.[84] As the

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[81] *See* Miss. Const. of 1817, art. VI, § 20 ("That the general assembly shall take measures to preserve from unnecessary waste or damage such lands as are or may hereafter be granted by the United States for the use of schools ... and apply the funds which may be raised from such lands, by rent or lease, in strict conformity to the object of such grant; but no lands granted for the use of such township schools shall ever be sold by any authority in this State."). Congress had authorized the leasing, but not sale, of Mississippi sixteenth section land in 1815. *See* Act of Jan. 9, 1815, 3 Stat. 163.

[82] *See* Miss. Const. of 1832, Schedule, § 4.

[83] *Lipscomb I*, 145 F.3d at 246.

[84] *See id.* (citing *Madison County*, 939 F.2d at 305-06, and *Schmidt*, 232 U.S. at 173-74, 34 S.Ct. 301).

prior opinion did not expressly or by necessary implication rule on the nature of the state-law trust, there is no law of the case on the state-law trust.

With increasing state regulation, regulated private parties' expectations of being freed from future regulations by contract with the state becomes less reasonable. The Mississippi statutes of the nineteenth century, however, acted to facilitate the transfer of state land to private parties, not to limit the activities of private parties. The statute authorizing the renewable forever leases in Columbus reflects the State's interest in encouraging the development of land in that township--as we will explain, not in derogation of trust obligations but in their discharge.

E

In discharging its obligations to administer the lands for the benefit of education, Mississippi faced certain realities. Unsettled land generates no revenue for the State; yields no agricultural bounty; supports no population; and generates no commerce. Both sales and long-term leases at low rates encourage settlement and private investment in new lands.

But a lease that is renewable forever is here superior to a land sale. By retaining title to the land, the State protects itself against default. A lease ensures a perpetual stream of income, however small, that guarantees that misfortune or mismanagement of sales proceeds cannot completely dissipate the income from the lease. Selling land for a lump-sum risks such a loss. Such a judgment is born out in Mississippi's history and the sad story of the Chickasaw lieu lands.[85] In 1836, Congress conveyed some 174,555 acres of land from the Chickasaw Cession to Mississippi in lieu of sixteenth section land. In 1856, Mississippi sold this land and invested the

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[85] *See Papasan*, 478 U.S. at 271-72, 106 S.Ct. 2932.

proceeds in 8 percent loans to Mississippi's railroads. Within ten years, this entire investment was rendered worthless when Mississippi's railroads were destroyed during the Civil War.

Thus, to this day Mississippi continues to receive its bargained-for benefit from these leases, just as the leaseholders reap the benefit of (now) extremely favorable rental rates. The leases have generated a constant stream of revenue that is secured by the State's continuing ownership in the land. For the first 50 years or so the rental income sustained the schools. The guarantee of perpetual low lease rates attracted settlement in Columbus, and the leaseholders improved the land they held, increasing the general wealth of the community and enlarging the tax base for later property taxes to support schools. Upsetting this balance by invalidating the renewal lease rates would substantially impair the contracts.

The State identifies a significant, legitimate, public interest in the leased sixteenth section lands. The Mississippi courts have stated that preservation of the trust lands for the benefit of the schools is a central governmental power and duty, comparable to the police powers.[86] As we have explained, Mississippi case law has repeatedly emphasized the significance of the State's interest in preserving the value of the sixteenth section lands.

Of course, this interest in protecting the school lands trust is a valid reason for the State's action. Funding schools and avoiding the dissipation of state assets are classic police

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[86] *Dear*, 212 Miss. 620, 55 So.2d at 373-74 (1951) ("[T]he exercise of the police power of the State is inherent in the existence of a government and is not the subject of a waiver, barter, forfeiture or sale. The State cannot abdicate its duty as trustee of property in which the whole people are interested, such as sixteenth section land held by the State as trustee for schools, any more than the State can surrender its police power in the administration of government and in the preservation of peace and order.").

functions, and section 95 of the Mississippi Constitution is a law of "broad and general" application that does not single out any subset of leaseholders.[87] All this is a given--but it does not respond to the reality that the original structure of the leases has not frustrated the state's obligation. To the contrary, it has rather done the opposite.

We now turn to the final step of the analysis. The State is a party to the contracts, so we cannot defer in the manner of due process to the State's judgment of the reasonableness of its threatened action.[88] Instead, we first ask whether the contracts surrender "an essential attribute of [the State's] sovereignty."[89] If not, we judge the reasonableness and necessity of the impairment.

The leases do not surrender any essential attribute of the State's sovereignty. The leases do not limit the ability of the State to exercise its jurisdiction or police powers over the land. Mississippi courts have stated that the State's duty to the school lands trust is like a police power that cannot be contracted away.[90] But the State has not contracted away its stewardship over the school lands. As we explained, the leases themselves represent the State's fulfillment of its obligation to ensure the funding of schools.

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[87] *Energy Reserves Group*, 459 U.S. at 412, 103 S.Ct. 697.

[88] *United States Trust Co.*, 431 U.S. at 25-26, 97 S.Ct. 1505.

[89] *Id.* at 23, 97 S.Ct. 1505.

[90] Of course, whether state powers are legitimate justifications for impairment of contracts is a question of federal, not state, law. We need not decide the extent to which the State's trust obligations are like a police power, however, for its obligations under the trust are not diminished by the renewal rental rates of the Columbus school lands.

It is instructive that the Mississippi Supreme Court has noted that renewable forever leases are, for tax purposes, practically identical to lands sold by the State.[91] Thus, although the State received the benefit of retaining title to the leased lands, taxes can be levied against the leaseholders. The State has had the benefit of being able to tax the leased land--at the market value swelled by the incentive to develop created by the renewal and price terms--as if it had been sold, while retaining the protection of the collateral that leasing provides. The leases brought rental income and encouraged development that allowed the imposition of property taxes for the benefit of schools.

The leases exercise the State's power to serve the trust, they do not limit that power. The State seeks to escape a purely financial obligation--its agreement to accept fixed rent terms for the Columbus school lands while reaping the benefits of the land's development--an arrangement that proved to be a hedge against inflationary erosions of rental income, inevitably attended by increasing land "values."

In sum, invalidating the renewal rental rates of the leases is not reasonable and necessary to protect the State's interest in its school lands. Mississippi might have followed the familiar path of granting fee title to land in exchange for its development--a common practice in the American West and the Mississippi Territory. It is fair to ask whether in such circumstances the state could now exercise its police power to alter an incident of fee ownership to charge market rents in addition to school taxes without compensating the landowner. In actual fact, the state constructed a hedge.

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[91] *See Street*, 75 Miss. 822, 23 So. at 774.

The State insists, nonetheless, that the Supreme Court's decision in *City of El Paso v. Simmons*[92] requires that we reverse and find no violation of the Contract Clause. We disagree. *Simmons* involved a land purchase contract entered into in 1910. At that time, the Texas State Land Board was authorized to sell state lands for the benefit of the State's Permanent Free School Fund. The sales had generous terms and in practical effect the buyers of the land had only to put down one-fortieth of the purchase price and pay interest on the remaining principal in order to keep the property. But upon failure to pay interest, the statutes authorized forfeiture of the property back to the State.[93] A buyer retained a perpetual right of reinstatement, however, if he paid all of the back-interest due.[94] In 1941, the legislature changed the reinstatement law to allow reinstatement only within five years of forfeiture.[95] A buyer who failed to gain reinstatement within five years brought suit, alleging that the 1941 legislation violated the Contract Clause.[96]

The Supreme Court held that the 1941 legislation did not violate the Contract Clause. The Court emphasized that the measure was enacted to remedy a substantial abuse of the prior law: Speculators would enter into contracts to purchase land and then immediately default. If oil was discovered on their land, they would exercise their right to reinstatement;

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92 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965).

93 *See id.* at 498, 85 S.Ct. 577.

94 *See id.* at 498-99, 85 S.Ct. 577.

95 *See id.* at 499, 85 S.Ct. 577.

96 *See id.* at 500, 85 S.Ct. 577.

otherwise, they would remain in default.[97] In essence, the buyers purchased an option of infinite duration, obtaining all of the benefits of any substantial appreciation in the value of the property, while leaving Texas with the risk that the land would decline in value. This situation undermined the purpose of the land sale contracts-the funding of schools.[98] Further, it did not serve the purpose of the reinstatement clause, which was to protect bona fide purchases who fell behind on payments, not to subsidize speculators.[99]

The Supreme Court noted that the right to reinstatement "was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking."[100] The Court reasoned that the right to reinstatement could not have reasonably been intended to create "an endless privilege" since such a construction "would render the buyer's obligations under the contract quite illusory."[101] The fact that Texas was seeking to sell as much land as possible at the time of the sales did not undermine the validity of its change of policy.[102] Most importantly, the Court stated, "[l]aws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of the contract."[103] It

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97 *See id.* at 509-13, 85 S.Ct. 577.

98 *See id.* at 515, 85 S.Ct. 577.

99 *See id.*

100 *Id.* at 514, 85 S.Ct. 577.

101 *Id.*

102 *Id.*

103 *Id.* at 515, 85 S.Ct. 577.

then went on to note "the State's vital interest in administering its school lands to produce maximum revenue," and it concluded that given this interest and the prior abuses of the law, "a statute of repose was clearly necessary."[104]

This case differs substantially from *Simmons*. The reinstatement clause in *Simmons* operated to frustrate the purpose of the land sale contract by allowing speculators to buy an option on the land. An indefinite reinstatement provision, as the Court noted, rendered the buyer's obligations "illusory." Under this construction Texas would depend on the buyer's discretion in making payments. Thus, the purpose of the plan was frustrated from the outset.

As we have explained, in this case the leasing arrangements guaranteed Mississippi a steady stream of income, which in fact supported the public school in Columbus for many years. The renewable forever provisions created incentives for substantial investment in the development of leased lands and a growing tax base to further sustain the schools. Moreover, the state was left with remedies should the lessee default. The state got exactly what it needed, and the purpose of the contract was fulfilled, not frustrated.

V

To summarize: We have jurisdiction over this case. The current leases are renewals of the original leases executed before the ratification of the 1890 Constitution. Thus, section 95 of the 1890 Constitution impairs the renewal terms of the lease contracts. Because voiding the current lease rates onthe school lands substantially impairs the contract rights of the leaseholders, and the State's threatened action is not reasonable and necessary, we affirm the entry of summary judgment against the Secretary declaring that voiding the Columbus

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[104] *Id.* at 516, 85 S.Ct. 577.

school land leases would violate the Contract Clause, a declaration that may be enforced by injunctive relief.

We AFFIRM and REMAND to the district court for further proceedings including any necessary resolution of disputes over the entitlement of individual class members to the relief declared by the district court and today affirmed by this court. We do not suggest that there will be such disputes. Rather we here make clear that our mandate does not foreclose their resolution by the district court.

AFFIRMED and REMANDED.

APPENDIX B

United States Court of Appeals
Fifth Circuit

J. Randolph LIPSCOMB,
on behalf of himself and all others similarly situated;
Mayor, City of Columbus;
City Council of the City of Columbus, Mississippi,
as the statutorily designated successors in office to
the Trustees of Franklin Academy,
Plaintiffs-Appellants,

v.

THE COLUMBUS MUNICIPAL
SEPARATE SCHOOL DISTRICT,
Dr. Reuben E. Dilworth, Superintendent; et al.,
Defendants,

THE COLUMBUS MUNICIPAL
SEPARATE SCHOOL DISTRICT,
Dr. Reuben E. Dilworth, Superintendent; et al.,
Defendants-Appellants,

v.

STATE of MISSISSIPPI, Eric Clark, Secretary of State;
United States Department of Housing and Urban
Development; Eric Clark, Secretary of State,
Defendants-Appellees.

No. 96-60652.

June 23, 1998.

**Appeals from the United States District Court
for the Northern District of Mississippi.**

Before HIGGINBOTHAM, PARKER and DENNIS, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Plaintiff J. Randolph Lipscomb initiated this class action in federal district court, seeking a declaration as to the validity of certain leases of Mississippi sixteenth section land. In light of the state law issues involved in the case, the district court abstained from decision. We conclude that the district court abused its discretion in declining to exercise its proper jurisdiction.

I.

In 1816, the United States purchased for $130,000 from the Chickasaw Nation title to land that now comprises parts of northern Alabama and Mississippi. In 1817, following a pattern that had been in place since before the ratification of the U.S. Constitution, *see Papasan v. Allain*, 478 U.S. 265, 268-69, 106 S.Ct. 2932, 2935-36, 92 L.Ed.2d 209 (1986), Congress authorized the survey and sale of all these lands, except for "section No. 16, in each township, which shall be reserved for the support of schools therein." Land Sales Act of March 3, 1817, 3 Stat. 375. Parts of the present-day town of Columbus, Mississippi, fall within these sixteenth section lands.

Responding to the Congressional direction, Mississippi included in its 1817 Constitution a provision mandating that sixteenth section lands were never to be sold and that all funds acquired by the state through the rental or lease of such lands were to be set aside "for the use of schools." *See* Miss. Const. of 1817, art. 6, § 20. In 1821, the Mississippi legislature authorized the incorporation of the town of Columbus, which was located at an important crossing of the Tombigbee River. Intending to promote the development of Columbus, the legislature also established the Franklin Academy, the first public school in Mississippi. The legislature authorized the

president and trustees of the Academy to lease certain lots in the Columbus sixteenth section "for the term of ninety-nine years, reserving an annual rent therefor." *See* 1821 Miss. Laws Ch. XLVI, p. 73-74. The initial annual rent was to be determined by public auction. In 1830, concerned about the problem of lessees forfeiting their leases, the legislature amended the 1821 statute and ordered the insertion of the phrase "renewable forever" in all past and future Columbus sixteenth section leases. *See* Act of December 13, 1830, 1830 Miss. Laws 14th Sess. Ch. II, pp. 9-10.

In 1890, Mississippi adopted a new constitution, parts of which are still in force today. The 1890 Constitution placed a new condition on all sixteenth section lands in the state, directing that "[l]and belonging to, or under control of the state, shall never be donated, directly or indirectly, to private corporations or individuals." Miss. Const. of 1890, art. IV, § 95. Moreover, the 1890 Constitution limited the duration of leases of sixteenth section lands to twenty-five years. *See id.* art. VIII, § 211. In 1913, fears arose among the Columbus leaseholders that the constitution's twenty-five year leasing limit might invalidate their pre-existing leases. Mindful of the Contracts Clause of the United States Constitution, *see* U.S. Const. art. I, § 10 ("No State shall . . . pass any . . . law impairing the obligation of contracts . . . ."), the Mississippi legislature in 1914 responded to the Columbus lessees' concerns by passing a law authorizing the renewal of the Columbus leases in 1920 at their original terms. *See* 1914 Miss. Laws Ch. 462. The leases were so renewed.

In 1989, however, the Columbus leaseholders again became concerned following a Mississippi Supreme Court decision. In *Hill v. Thompson*, 564 So.2d 1 (Miss.1989), the court held that a ninety-nine year lease of a plot of sixteenth section land for the sum of $7.50 was voidable under the non-donation principle of § 95 of the 1890 Mississippi

Constitution.[1] As the court acknowledged, its decision had the effect of invalidating hundreds of sixteenth section leases across the state. *See id.* at 12. Notably, however, the case did not explicitly address leases with "renewable forever" clauses.

In 1988, after surveying Mississippi's case law, counsel for the Department of Housing and Urban Development in Jackson, Mississippi, determined that the 1890 Constitution rendered leaseholds of sixteenth section land in Columbus "virtually uninsurable." In 1990, responding to *Hill* and unhappy with the revenues generated by the Columbus leases, the president of the Columbus School Board announced that the Columbus sixteenth section leases were invalid and would have to be renegotiated. Various leaseholders responded by filing suit in Chancery Court in Lowndes County, Mississippi, seeking a confirmation of title. On January 16, 1992, however, the suit was voluntarily dismissed, to permit the filing of this complaint in federal court.

A few days later, on January 24, 1992, Randolph Lipscomb[2] filed a putative class action in the United States District Court for the Northern District of Mississippi against the Columbus School District, the Mississippi Secretary of State (who is statutorily authorized to administer sixteenth section lands), and HUD. His suit sought a declaration that the Columbus leases were valid and that the lessees possessed the right to renew the leases in 2019 at their original terms. On July 31, 1992, recognizing that at least 1,473 lessees had similar interests in Lipscomb's suit, the district court certified

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[1] Previous Mississippi cases had questioned the validity of sixteenth section leases under the 1890 Constitution, but none went as far as *Hill* in striking down those instruments. *See, e.g., Keys v. Carter,* 318 So.2d 862 (Miss.1975).

[2] Lipscomb holds two Columbus leases, the first originally granted in 1839 and the second in 1843. The rentals for his leases are $.11/year and $.93/year.

a class pursuant to Fed.R.Civ.P. 23. Lipscomb moved for summary judgment, and the Secretary of State moved 1) to decertify the class and 2) for the district court to abstain.

From February 1993 until July 1996, the district court held the case under advisement. On July 23, 1996, the court granted the Secretary of State's motion to abstain, citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The court reasoned that the case required an in-depth examination of Mississippi statutes and constitutional provisions, a task it felt was best left to the Mississippi courts. The court also noted in passing that the plaintiffs' case likely did not state a valid federal claim under the Contracts Clause. This timely appeal followed.

II.

We review a district court's decision to abstain for an abuse of discretion. *See Allen v. Louisiana State Bd. of Dentistry*, 948 F.2d 946, 949 (5th Cir.1991), *cert. denied*, 503 U.S. 1006, 112 S.Ct. 1764, 118 L.Ed.2d 426 (1992). In practice, however, our scrutiny is stricter. Because an exercise of abstention must occur within the specific limits of a particular abstention doctrine, "decisions to abstain are reviewed under a standard narrower than that applicable to decisions such as evidentiary rulings." *American Bank & Trust Co. v. Dent*, 982 F.2d 917, 922 n. 6 (5th Cir.1993).

A.

One of the two bases for abstention relied upon by the district court was *Burford* abstention. As the Supreme Court has defined the *Burford* doctrine:

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult

> questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361, 109 S.Ct. 2506, 2514, 105 L.Ed.2d 298 (1989) (citations omitted). Other than citing *Burford* in conjunction with *Pullman,* the district court made little effort to apply the *Burford* doctrine.

The district court erred in invoking *Burford* abstention. As we have stressed, *Burford* abstention requires the existence of a state administrative proceeding to which the federal court could defer. *See St. Paul Ins. Co. v. Trejo,* 39 F.3d 585, 589 (5th Cir.1994). This federal lawsuit interferes with no state administrative scheme. The Secretary of State argues that his office has supervisory and regulatory authority over sixteenth section lands. Yet the Secretary of State has not identified any administrative process by which the validity of sixteenth section leases is adjudicated. This lawsuit simply asks for a declaration of the lessees' rights, relief that in no way would interfere with Mississippi's system of regulating sixteenth section lands. *Cf. St. Paul Ins.,* 39 F.3d at 589 (rejecting *Burford* abstention where lawsuit did not seek to interfere with state regulatory process, but simply asked for an interpretation of a settlement agreement in light of a state statute). Accordingly, *Burford* abstention is inappropriate here. *See American Bank & Trust Co.,* 982 F.2d at 922 n. 6 (noting that district courts abuse their discretion when their abstention decisions exceed the bounds of narrow abstention doctrines).

B.

The other abstention rationale cited by the district court was the *Pullman* doctrine. As the Supreme Court has explained *Pullman*, "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and 'needless friction with state policies. . . .' " *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984) (quoting *Pullman*, 312 U.S. at 500, 61 S.Ct. at 645). *Pullman* abstention depends first and foremost upon an ambiguity in state law. *See Baran v. Port of Beaumont Navigation Dist.*, 57 F.3d 436, 442 (5th Cir.1995). *Pullman* does not command district courts to abstain simply to permit state review of an unambiguous statute that has previously never been interpreted by a state court. *See City of Houston v. Hill*, 482 U.S. 451, 469, 107 S.Ct. 2502, 2513-14, 96 L.Ed.2d 398 (1987). Moreover, the mere presence of an ambiguity in state law and a likelihood of avoiding a constitutional adjudication does not automatically compel *Pullman* abstention. Rather, before abstaining, "[a] district court must carefully assess the totality of circumstances presented by a particular case. This requires a broad inquiry which should include consideration of the rights at stake and the costs of delay pending state court adjudication." *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir.1981), *cert. dismissed*, 459 U.S. 1012, 103 S.Ct. 368, 74 L.Ed.2d 504 (1982).

Here, the district court abstained under *Pullman* after determining that a potential conflict between the 1914 Mississippi statute and the Mississippi Constitution of 1890 was a substantial question of state law that might moot the federal constitutional issue. This was error.

The district court's *Pullman* rationale for abstention essentially ignored the bite of Lipscomb's argument. Lipscomb contends that prior to 1890, lessees in Columbus obtained pursuant to statutory authorization ninety-nine year leases on Columbus property that were renewable at their original terms forever. Lipscomb argues that the School District cannot employ the 1890 Constitution's prohibition against the donation of public lands to invalidate the Columbus leases, because doing so would impair the obligations of a contract in violation of the federal Contracts Clause. As Lipscomb asserts, the 1914 legislation, which confirmed that the leases could be renewed in 1920 at their original terms, is irrelevant to his argument. If the lessees enjoyed before 1890 a contractual right to renew their leases in perpetuity, they did not need a statute in 1914 to restate that right for them. *Cf. Read v. Plattsmouth*, 107 U.S. (17 Otto) 568, 575-76, 2 S.Ct. 208, 214-16, 27 L.Ed. 414 (1883)(noting that a law recognizing an existing, binding obligation of the state is not retroactive). In a sense, therefore, the 1914 legislation was wholly unnecessary.[3]

The district court, however, focused solely on the legality of the 1914 statute in deciding to abstain under *Pullman*. The court reasoned that since the leases were apparently renewed under the authority of the 1914 statute, it would take a Mississippi court to determine whether the 1914 statute conflicted with the 1890 Constitution. *Pullman* abstention is appropriate only when there exists an ambiguous issue of state

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[3] Apparently, lessees in Columbus petitioned the Mississippi legislature in 1913 to pass the statute in order to remove a cloud over their title created by the 1890 Constitution. The Columbus City Attorney, E.T. Sykes, wrote a brief to the legislature requesting the enactment of the statute. The brief strongly stated that the 1890 Constitution could not impair the vested rights of the lessees to renew their leases forever, but it requested the legislation anyway "as a matter of security" to silence various "Doubting Thomases" who had questioned the leases.

law, the resolution of which by a state court might help a federal court to avoid a constitutional decision. *See Hawaii Hous. Auth.*, 467 U.S. at 236, 104 S.Ct. at 2327. Here, settling the Mississippi constitutionality of the 1914 statute would not help to resolve the federal constitutional claims of the class, for those claims are premised on a conflict between the 1890 Mississippi Constitution and the pre-existing leases.[4] Perhaps acknowledging the irrelevance of the 1914 statute, the Secretary of State advances an alternate basis for finding that this litigation implicates unsettled questions of state law. The Secretary of State argues that the 1830 statute granting the trustees of Franklin Academy the right to issue renewable-forever leases was later repealed by statutes in 1830 and 1833. Lipscomb's own leases, along with many others that purportedly contain the renewable-forever terms, were crafted after 1830. Thus, argues the Secretary of State, there is an unsettled question of state law regarding the legality of the renewable-forever terms in the Columbus leases, which requires adjudication in the first instance in a Mississippi court.

The statute authorizing the Columbus trustees to issue renewable-forever leases was enacted on December 13, 1830, and reads, in pertinent part:

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[4] The district court also relied on our opinion in *Frazier v. Lowndes County, Miss. Bd. of Educ.*, 710 F.2d 1097, 1099 (5th Cir.1983) to support its argument that the legal threats from the School District here did not implicate the Contracts Clause. Although the applicability of *Frazier* may speak to the merits of this case, to the extent that the district court relied on *Frazier* in its decision to abstain, it erred. In *Frazier*, we rejected the claim that a school district's threatened cancellation of sixteenth section leases violated the Contracts Clause. We only found the Contracts Clause inapplicable, however, because the legal authority upon which the school district relied in challenging the leases predated those leases. *See id.* at 1099 ("[T]he Lowndes County Board of Education claims a right based on a new interpretation of preexisting authority . . . to terminate the leases."). Here, on the other hand, the school district allegedly challenges the Columbus leases under the authority of the Mississippi Constitution of 1890, which postdated them—a potential Contracts Clause violation.

> [T]he Trustees of said Franklin Academy be, and they are hereby authorized to lay off and lease lots, not to consist of more than ten acres each,for the same time, and in like manner, and on like condition with those in the present plan of the town of Columbus, throughout the section; and that said Trustees be, and are hereby authorized to make out all leases for the lots of said section, for ninety nine years, dating from the first leasing of lots in said town of Columbus, renewable forever. *Providing, always,* that the payment of leases on said lots be made annually in advance, as before; and that all leases heretofore made of lots, by the said Trustees, be renewable at the expiration of the time for which these were leases, in like manner as above, provided for, in cases of lots to be leased hereafter.

Act of December 13, 1830, 1830 Miss. Laws 14th Sess. Ch. II, pp. 9-10. The Secretary of State notes, however, that three days later the Mississippi legislature passed a new law. This statute, dated December 16, 1830, directed the trustees of schools in a variety of counties, including Lowndes (the county containing Columbus), to lease sixteenth section lands for fixed ninety-nine year terms, whenever a "majority of the heads of families in any township" requested them to do so. Act of December 16, 1830, 1830 Miss. Laws 14th Sess. Ch. II, pp. 330-31. The December 16 statute also contained a repealing clause providing that "all acts and parts of acts coming within the meaning and purview of this act be, and the same are hereby repealed." *Id.*[5] Furthermore, in 1833, the Mississippi

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[5] The December 16 statute reads, in pertinent part: Sec. 1. *Be it enacted by the Senate and House of Representatives of the state of Mississippi, in General Assembly convened,* That hereafter whenever a majority of the heads of families in any township in the counties of Madison, Jefferson, Claiborne, Monroe, and Lowndes, shall deem it expedient, and shall in writing, direct the trustees for schools in said

legislature passed another sixteenth section statute, with substantially the same provisions as the December 16, 1830 statute. *See* Act of February 27, 1833, 1833 Miss. Laws pp. 452-54.[6] Like the second 1830 act, the 1833 statute contained a clause dictating that "all acts and parts of acts contravening the provisions of this act be and the same are hereby repealed." *Id.*

The Secretary of State contends that there is a substantial question whether the second 1830 statute and the 1833 statute

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township to lease for the term of ninety-nine years, the sixteenth section, or other lands reserved in lieu thereof, it shall be their duty to do so on their giving thirty days notice in the nearest newspaper and at three of the most public places in said county of the time and place of leasing the same.

. . . .

Sec. 3. *And be it further enacted,* That said land shall be offered for lease in lots of not more than a quarter of a section, not less than an eighth of a section. . . .

. . . .

Sec. 6. *And be it further enacted,* That all acts and parts of acts coming with the meaning and purview of this act be, and the same are hereby repealed.

Act of December 16, 1830, 1830 Miss. Laws 14th Sess. Ch. II, pp. 330-31.

[6] The 1833 statute reads, in pertinent part: Section 1. *Be it enacted by the Legislature of the state of Mississippi,* That whenever a majority of the resident heads of families, (minors excepted,) in each township, or fractional township, containing section No. 16. or such section as may be reserved for the use of schools in lieu thereof, within this state, shall request the same, it shall be the duty of the trustees now in office, or who may hereafter be in office, to lease the said section of their respective townships to the highest bidder, for the term of ninety-nine years, . . . *Provided,* that said trustees may divide and lease such section in lots of not less than eighty acres, if they should deem the same most advantageous. . . .

. . . .

Sec. 8. *And be it further enacted,* That this act shall not be construed as to affect any prior disposition, which may have been made of any of the sections of any township within this state; and that all acts and parts of acts contravening the provisions of this act be and the same are hereby repealed.

Act of February 27, 1833, 1833 Miss. Laws pp. 452-54.

both repealed the first 1830 statute, which permitted renewable-forever leases. Accordingly, argues the Secretary of State, the federal constitutional question regarding the conflict between the 1890 Constitution and the pre-existing Columbus leases is preceded by a state law question concerning the authority of the school trustees to enter into renewable-forever leases before 1890. If the trustees lacked such authority, contends the Secretary of State, the federal constitutional question would be mooted, thereby justifying *Pullman* abstention.

We disagree, for we find that the statutory scheme involved here is not so ambiguous as to require *Pullman* abstention. *See City of Houston*, 482 U.S. at 469, 107 S.Ct. at 2514 (requiring ambiguity in statutory scheme before abstention is to be exercised). The Secretary of State faces an uphill struggle in establishing the requisite state-law ambiguity, for the Mississippi Supreme Court in 1898 confirmed that the Columbus leases were properly made renewable forever. In *Street v. City of Columbus*, 75 Miss. 822, 23 So. 773 (1898), Columbus leaseholders challenged the authority of Columbus to tax the capital value of their leases, a value which had arisen because the locked- in rents did not reflect the true value of the leaseholds. In holding that Columbus could so tax the leases, the court repeatedly acknowledged that the Columbus leases were renewable forever. *See id.* at 773 ("These leases, as we learn from the briefs of counsel, the leases themselves, and the act of the legislature under which they were made, are renewable forever, at the option of the lessees."); *id.* at 774 (repeatedly noting that a statute made the leases renewable forever). Although the precise question of the renewability of the Columbus leases was not before the *Street* Court, the opinion's affirmation of the leases' perpetual terms was not dicta, for acknowledging that the leases were so renewable was necessary to establish the extent of their capital value.

The *Street* opinion made no mention of the two statutes cited by the Secretary of State, in all likelihood because no party thought them relevant to the Columbus leases. Indeed, no Mississippi authority has ever suggested that the two statutes affect the renewable-forever nature of the Columbus leases. *Cf. City of Houston*, 482 U.S. at 469, 107 S.Ct. at 2514 (noting that simple fact that statute has not previously been construed does not supply requisite ambiguity to justify abstention). On the contrary, an 1848 official compilation of the Mississippi Code lists all statutes governing the Columbus sixteenth section land, but does not refer to the two laws cited by the Secretary of State. *See* A. Hutchinson, *Code of Mississippi* 246 (1848).

Although the *Street* opinion alone removes most doubt about the validity of the perpetual terms in the Columbus leases, we are confident that even if the *Street* Court had confronted the Secretary of State's two statutes, it would have found them inapplicable to Columbus. By their terms, the December 16, 1830 and February 27, 1833 statutes did not dissipate any pre- existing leases nor were they self-executing. Rather, the two statutes provided that the trustees of school districts in Lowndes county were to lease sixteenth section lands for ninety-nine year terms *only* when the majority of households in a community requested them to do so. There is no evidence to suggest that the households in Columbus ever voluntarily invoked those statutes. Indeed, it would have been absurd for them to have done so. Both the December 16, 1830 and February 27, 1833 statutes mandated a minimum lot size of eighty acres. The eighty-acre minimum indicates that the legislature was contemplating rural lots. By 1830, however, the Columbus sixteenth section was urban. In accordance with its urban nature, the December 13, 1830 statute that specifically empowered the Columbus school trustees to authorize renewable-forever leases permitted lots of no more than ten acres each. The Mississippi legislature in enacting the

general December 16, 1830 statute could not possibly have intended to repeal its more specific December 13, 1830 law, passed just three days earlier. If the December 16, 1830 statute was a mandatory, overriding provision, it would have allowed only eight lots on the 640-acre Columbus sixteenth section, thereby depopulating the city of Columbus. The Secretary of State perhaps should be commended for his creativity, if not his nineteenth-century legal research, but the two statutes he has located have failed to create a substantial ambiguity in state law.

Finally, the Secretary of State contends that the December 13, 1830 statute authorizing renewable forever Columbus leases 1) was invalid under the 1817 Mississippi Constitution, which prohibited the "sale" of sixteenth section land, and 2) violated the trust under which Mississippi held the land. While a renewable-forever lease may in practical effect resemble a "sale," the United States Supreme Court has acknowledged that in legal effect such instruments are leases. *See Bosley v. Wyatt,* 55 U.S. (14 How.) 390, 396, 14 L.Ed. 468 (1852); *see also Street,* 75 Miss. 822, 23 So. 773 (construing the Columbus leases as "leases"). The contention that the leasing of this sixteenth section land violated the trust for the benefit of schoolchildren under which Mississippi held the land is also easily dispatched. As we have previously stated with respect to indistinguishable Choctaw sixteenth section land in Mississippi, the trust under which Mississippi operated at best created an honorary, not a mandatory, obligation on the part of the state to administer the lands for the benefit of schoolchildren. *See Madison County Bd. of Educ. v. Illinois Central R.R. Co.,* 939 F.2d 292, 303-05 (5th Cir.1991); *see also Alabama v. Schmidt,* 232 U.S. 168, 34 S.Ct. 301, 58 L.Ed. 555 (1914) (permitting title to similar sixteenth section lands in Alabama to pass by adverse possession, because trust obligations were merely honorary in nature). Moreover, it is doubtful that the leasing of the Columbus sixteenth section

land even violated the honorary trust. The legislature apparently authorized the renewable-forever terms in the leases to prevent lessees from forfeiting, an action that itself would deprive the schools of funds. The renewable-forever terms encouraged the development of the city of Columbus, an event at least indirectly beneficial to the schools. *See Madison County*, 939 F.2d at 306-07 (reasoning that the development of railroads generally benefitted education in Mississippi, even if the railroad companies received sixteenth section right-of-ways for free).

Even assuming, for the sake of argument, that some uncertainty exists in these unconstrued nineteenth century statutes, the presence of a minute degree of ambiguity does not in and of itself demand *Pullman* abstention. *Cf. Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 1324, 12 L.Ed.2d 377 (1964) ("The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers."). Instead, in determining whether abstention is appropriate in any particular case, we must consider the totality of circumstances. *See Duncan*, 657 F.2d at 697. Lipscomb cites several factors that cut against abstention. First, assuming that the class was properly certified, sending this case back to state court would be inefficient, as Mississippi law does not permit class action litigation. *See* Miss. R. Civ. P. 23, Comment ("Class action practice is not being introduced into Mississippi trial courts at this time."). Accordingly, were we to uphold federal abstention, Lipscomb would either have to litigate this case individually or join the other 1,400 Columbus lessees to his state lawsuit. *Cf. Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 777 (5th Cir.1993) (approving of use of federal declaratory judgment actions to avoid multiplicity of state lawsuits). Second, the exercise of federal jurisdiction in this case would not substantially intrude upon Mississippi's state

interests. Even though there are numerous Columbus lessees, the Columbus leases, with their renewable- forever terms, are apparently unique among the sixteenth section leases in Mississippi. As such, even if we were to resolve a minor ambiguity in Mississippi law, our decision would have no far reaching preclusive effects in the state. *Cf. Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976) ("Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar.").

The district court's stated reasons for abstention were erroneous. Moreover, despite the Secretary of State's suggestions, the legality of the Columbus leases under pre-1890 law is not so ambiguous as to require deference to a state court pursuant to *Pullman*. Even assuming that some minor degree of state-law ambiguity exists with respect to the leases, other factors in this case argue in favor of the exercise of federal jurisdiction.

III.

The Secretary of State has advanced a variety of other arguments against our granting of relief to the class. He notes that the price terms of Lipscomb's own leases have changed throughout the years, perhaps suggesting that Lipscomb's leases were not renewals but were in fact new leases. The Secretary of State also argues that tax sales appear in the chain of title of a number of the Columbus leases, thereby terminating those leasehold interests. Neither of these contentions, however, identifies an ambiguity in state law sufficient to justify abstention. Rather, the Secretary of State suggests complications that the district court will have to

surmount in ruling on the merits of this case and/or fashioning class relief.[7]

We conclude that the district court abused its discretion in declining to exercise its proper jurisdiction. This litigation does not implicate any issue of state law that is so ambiguous as to justify abstention. Similarly, certification to the Mississippi Supreme Court would be inappropriate here: "[A]bsent genuinely unsettled matters of state law, we are reluctant to certify." *Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th Cir.1997).

REVERSED AND REMANDED.

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[7] Lipscomb points us to certain exceptional cases in which our court has addressed the merits of a claim after finding that the district court below erred in abstaining. *See, e.g., Snap-on Tools Corp. v. Mason*, 18 F.3d 1261, 1267 n. 7 (5th Cir.1994). Assuming that we have the power to grant summary judgment in favor of the class, as Lipscomb requests, we decline to do so, given the complexities that remain in this case.

APPENDIX C

United States District Court,
N.D. Mississippi,
Eastern Division.

J. Randolph LIPSCOMB, et al.,
Plaintiffs,

v.

The COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, et al.,
Defendants.

No. 1:92CV020-S-D.

March 22, 2000.

OPINION

SENTER, Senior District Judge.

Plaintiff J. Randolph Lipscomb initiated this class action seeking a declaration as to the validity of certain leases of Mississippi sixteenth section land.

In 1816, the United States purchased for $130,000 from the Chickasaw Nation title to land that now comprises parts of northern Alabama and Mississippi. In 1817, following a pattern that had been in place since before the ratification of the U.S. Constitution, *see Papasan v. Allain*, 478 U.S. 265, 268-69, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986), Congress authorized the survey and sale of all these lands, except for "section No. 16,

in each township, which shall be reserved for the support of schools therein." Land Sales Act of March 3, 1817, 3 Stat. 375. Parts of the present-day City of Columbus, Mississippi, fall within these sixteenth section lands.

Responding to the Congressional direction, Mississippi included in its 1817 Constitution a provision mandating that sixteenth section lands were never to be sold and that all funds acquired by the state through the rental or lease of such lands were to be set aside "for the use of schools." *See* Miss. Const. of 1817, art. 6, § 20. In 1821, the Mississippi legislature authorized the incorporation of the town of Columbus, which was located at an important crossing of the Tombigbee River. Intending to promote the development of Columbus, the legislature also established the Franklin Academy, the first public school in Mississippi. The legislature authorized the president and trustees of the Academy to lease certain lots in the Columbus sixteenth section "for the term of ninety-nine years, reserving an annual rent therefor." *See* 1821 Miss.Laws Ch. XLVI, p. 73-74. The initial annual rent was to be determined by public auction. In 1830, concerned about the problem of lessees forfeiting their leases, the legislature amended the 1821 statute and ordered the insertion of the phrase "renewable forever" in all past and future Columbus sixteenth section leases. *See* Act of December 13, 1830, 1830 Miss.Laws 14th Sess. Ch. II, pp. 9-10. This "renewable-forever" provision appears to be peculiar to sixteenth section leases in the City of Columbus, Mississippi, and nowhere else.

In 1890, Mississippi adopted a new constitution, parts of which are still in force today. The 1890 Constitution placed a new condition on all sixteenth section lands in the state, directing that "[l]and belonging to, or under control of the state, shall never be donated, directly or indirectly, to private corporations or individuals." Miss. Const. of 1890, art. IV, § 95. Moreover, the 1890 Constitution limited the duration of leases of sixteenth section lands to twenty-five years. *See id.*

art. VIII, § 211. In 1913, fears arose among the Columbus leaseholders that the constitution's twenty-five year leasing limit might invalidate their pre-existing leases. Mindful of the Contracts Clause of the United States Constitution, *see* U.S. Const. art. I, § 10 ("No State shall ... pass any ... law impairing the obligation of contracts...."), the Mississippi legislature in 1914 responded to the Columbus lessees' concerns by passing a law authorizing the renewal of the Columbus leases in 1920 at their original terms. *See* 1914 Miss.Laws Ch. 462. The leases were so renewed.

In 1989, however, the Columbus leaseholders again became concerned following a Mississippi Supreme Court decision. In *Hill v. Thompson,* 564 So.2d 1 (Miss.1989), the court held that a ninety-nine year lease of a plot of sixteenth section land for the sum of $7.50 was voidable under the nondonation principle of § 95 of the 1890 Mississippi Constitution. As the court acknowledged, its decision had the effect of invalidating hundreds of sixteenth section leases across the state. *See id.* at 12. Notably, however, the case did not explicitly address leases with "renewable forever" clauses.

In 1988, after surveying Mississippi's case law, counsel for the Department of. Housing and Urban Development in Jackson, Mississippi, determined that the 1890 Constitution rendered leaseholds of sixteenth section land in Columbus "virtually uninsurable." In 1990, responding to *Hill* and unhappy with the revenues generated by the Columbus leases, the president of the Columbus School Board announced that the Columbus sixteenth section leases were invalid and would have to be renegotiated. Various leaseholders responded by filing suit in Chancery Court in Lowndes County, Mississippi, seeking a confirmation of title. On January 16, 1992, however, the suit was voluntarily dismissed to permit the filing of this complaint in federal court.

A few days later, on January 24, 1992, Randolph Lipscomb filed a putative class action in this court against the Columbus School District, the Mississippi Secretary of State (who is statutorily authorized to administer sixteenth section lands), and HUD. His suit sought a declaration that the Columbus leases were valid and that the lessees possessed the right to renew the leases in 2019 at their original terms. On July 31, 1992, recognizing that at least 1,473 lessees had similar interests in Lipscomb's suit, this court certified a class pursuant to Fed.R.Civ.P. 23. Lipscomb moved for summary judgment, and the Secretary of State moved 1) to decertify the class and 2) for the district court to abstain.

On July 23, 1996, this court granted the Secretary of State's motion to abstain, citing *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The court reasoned that the case required an in-depth examination of Mississippi statutes and constitutional provisions, a task it felt was best left to the Mississippi courts.

On June 23, 1998, the Fifth Circuit Court of Appeals, in *Lipscomb v. Columbus Municipal Separate School District*, 145 F.3d 238 (5th Cir.1998), found this court in error in declining to exercise jurisdiction in this case and found that this litigation does not implicate any issue of state law that is so ambiguous as to justify abstention. Following remand to this court, the plaintiffs filed their revised motion for summary judgment; the Mississippi Secretary of State filed his cross-motion for summary judgment with a motion to decertify the class. HUD moved to be dismissed from the case. This court now proceeds to make its findings of fact and rulings of law pursuant to Rule 56 of the FRCP.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FRCP 56(c).

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden then shifts to the nonmovant to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548. While all legitimate factual inferences must be viewed in the light most favorable to the nonmovant, Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. 2548. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the nonmovant. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

II.

Lipscomb contends that prior to 1890, lessees in Columbus obtained, pursuant to statutory authorization, 99-year leases on Columbus property that were renewable at their original terms forever. Lipscomb contends that the school district cannot employ the 1890 constitution's prohibition against the donation of public lands to invalidate the Columbus leases, because doing so would impair the obligations of a contract in violation

of the federal contracts clause. Lipscomb asserts that the 1914 legislation, which confirmed that the leases could be renewed in 1920 at their original terms, is irrelevant. Simply stated, it is the contention of plaintiffs that if the lessees enjoyed, before 1890, a contractual right to renew their leases in perpetuity, they did not need a statute in 1914 to restate that right for them.

The Secretary of State argues that the 1830 statute granting the trustees of Franklin Academy the right to issue renewable-forever leases was later repealed by statutes in 1830 and 1833.

The statute authorizing the Columbus trustees to issue renewal-forever leases was enacted on December 13, 1830, and reads in pertinent part:

> [T]he Trustees of said Franklin Academy be, and they are hereby authorized to lay off and lease lots, not to consist of more than ten acres each, for the same time, and in like manner, and on like condition with those in the present plan of the town of Columbus, throughout the section; and that said Trustees be, and are hereby authorized to make out all leases for the lots of said section, for ninety nine years, dating from the first leasing of lots in said town of Columbus, renewable forever. Providing, always, that the payment of leases on said lots be made annually in advance, as before; and that all leases heretofore made of lots, by the said Trustees, be renewable at the expiration of the time for which these were leases, in like manner as above, provided for, in cases of lots to be leased hereafter.

Act of December 13, 1830, 1830 Miss.Laws 14th Sess. Ch. II, pp. 9-10. The Secretary of State notes, however, that three days later, the Mississippi legislature passed a new law. This statute, dated December 16, 1830, directed the trustees of schools in a variety of counties, including Lowndes (the county containing Columbus), to lease sixteenth section lands for fixed

ninety-nine year terms, whenever a "majority of the heads of families in any township" requested them to do so. Act of December 16, 1830, 1830 Miss.Laws 14th Sess. Ch. II, pp. 330-31. The December 16 statute also contained a repealing clause providing that "all acts and parts of acts coming within the meaning and purview of this act be, and the same are hereby repealed." *Id.* Furthermore, in 1833, the Mississippi legislature passed another sixteenth section statute, with substantially the same provisions as the December 16, 1830 statute. *See* Act of February 27, 1833, 1833 Miss.Laws pp. 452-54. Like the second 1830 act, the 1833 statute contained a clause dictating that "all acts and parts of acts contravening the provisions of this act be and the same are hereby repealed." *Id.*

The Secretary of State contends that the second 1830 statute and the 1833 statute both repealed the first 1830 statute, which permitted renewable- forever leases. Accordingly, argues the Secretary of State, there is a conflict between the 1890 Constitution and the pre-existing Columbus leases as to the authority of the school trustees to enter into renewable-forever leases before 1890. If the trustees lacked such authority, contends the Secretary of State, the federal constitutional question in this case would be mooted, and plaintiff would be entitled to no relief.

The Secretary of State is manifestly wrong. In *Street v. City of Columbus,* 75 Miss. 822, 23 So. 773 (1898), Columbus leaseholders challenged the authority of Columbus to tax the capital value of their leases, a value which had arisen because the locked-in rents did not reflect the true value of the leaseholds. In holding that Columbus could so tax the leases, the court repeatedly acknowledged that the Columbus leases were renewable forever. *See, id.,* at 773. ("These leases, as we learn from the briefs of counsel, the leases themselves, and the act of the legislature under which they were made, are renewable forever, at the option of the lessees.") *id.* at 774 (repeatedly noting that a statute made the leases renewable

forever). Although the precise question of the renewability of the Columbus leases was not before the *Street* Court, the court's affirmation of the leases' perpetual terms was not dicta, for acknowledging that the leases were so renewable was necessary to establish the extent of their capital value.

The *Street* opinion made no mention of the two statutes cited by the Secretary of State, in all likelihood because no party thought them relevant to the Columbus leases. Indeed, no Mississippi authority has ever suggested that the two statutes affect the renewable-forever nature of the Columbus leases. *Cf. City of Houston,* 482 U.S. at 469, 107 S.Ct. 2502 (noting that simple fact that statute has not previously been construed does not supply requisite ambiguity to justify abstention). On the contrary, an 1848 official compilation of the Mississippi Code lists all statutes governing the Columbus sixteenth section land, but does not refer to the two laws cited by the Secretary of State. *See* A. Hutchinson, *Code of Mississippi* 246 (1848).

Although the *Street* opinion alone removes most doubt about the validity of the perpetual terms in the Columbus leases, this court is confident that even if the *Street* Court had confronted the Secretary of State's two statutes, it would have found them inapplicable to Columbus. By their terms, the December 16, 1830, and February 27, 1833, statutes did not dissipate any pre-existing leases nor were they self-executing. Rather, the two statutes provided that the trustees of school districts in Lowndes County were to lease sixteenth section lands for ninety-nine year terms only when the majority of households in a community requested them to do so. There is no evidence to suggest that the households in Columbus ever voluntarily invoked those statutes. Indeed, it would have been absurd for them to have done so. Both the December 16, 1830, and February 27, 1833, statutes mandated a minimum lot size of eighty acres. The eighty-acre minimum indicates that the legislature was contemplating rural lots. By 1830,

however, the Columbus sixteenth section was urban. In accordance with its urban nature, the December 13, 1830, statute that specifically empowered the Columbus school trustees to authorize renewable-forever leases permitted lots of no more than ten acres each. The Mississippi legislature in enacting the general December 16, 1830, statute could not possibly have intended to repeal its more specific December 13, 1830, law, passed just three days earlier. If the December 16, 1830, statute was a mandatory, overriding provision it would have allowed only eight lots in the 640-acre Columbus sixteenth section, thereby depopulating the City of Columbus.

The Secretary of State also contends that the December 13, 1830, statute authorizing renewable-forever Columbus leases 1) was invalid under the 1817 Mississippi Constitution, which prohibited the "sale" of sixteenth section land, and 2) violated the trust under which Mississippi held the land. While a renewable-forever lease may in practical effect resemble a "sale," the United States Supreme Court has acknowledged that in legal effect such instruments are leases. *See Bosley v. Wyatt*, 55 U.S. (14 How.) 390, 396, 14 L.Ed. 468 (1852); *see also Street*, 75 Miss. 822, 23 So. 773 (construing the Columbus leases as "leases"). The contention that the leasing of this sixteenth section land violated the trust for the benefit of school children under which Mississippi held the land is also easily dispatched. As previously stated with respect to indistinguishable Choctaw sixteenth section land in Mississippi, the trust under which Mississippi operated at best created an honorary, not a mandatory, obligation on the part of the state to administer the lands for the benefit of school children. *See Madison County Bd. of Educ. v. Illinois Central R.R. Co.*, 939 F.2d 292, 303-05 (5th Cir.1991); *see also Alabama v. Schmidt*, 232 U.S. 168, 34 S.Ct. 301, 58 L.Ed. 555 (1914) (permitting title to similar sixteenth section lands in Alabama to pass by adverse possession, because trust obligations were merely honorary in nature). Moreover, it is

doubtful that the leasing of the Columbus sixteenth section land even violated the honorary trust. The legislature apparently authorized the renewable-forever terms in the leases to prevent lessees from forfeiting, an action that itself would deprive the schools of funds. The renewable-forever terms encouraged the development of the City of Columbus, an event at least indirectly beneficial to the schools. *See Madison County,* 939 F.2d at 306-07 (reasoning that the development of railroads generally benefitted education in Mississippi, even if the railroad companies received sixteenth section right-of-ways for free).

The Secretary of State has advanced a variety of other arguments against the granting of relief to the class. He notes that the price terms of Lipscomb's own leases have changed throughout the years, perhaps suggesting that Lipscomb's leases were not renewals but were in fact new leases. The Secretary of State also argues that tax sales appear in the chain of title of a number of the Columbus leases, thereby terminating those leasehold leases. In the process of developing the City of Columbus, the original lessees and their successors at times subdivided the original parcels and conveyed their leasehold interests in the subdivided parcels. This caused a difference in rentals, but in the aggregate, the rentals from these parcels remained substantially the same, negating the Secretary of State's assertion that these were in fact new leases.

Also, the fact that tax sales appear in the chain of title to some of the leases should not prevent the remainder of the leaseholders from asserting the validity of their leases. The fact remains that the unredeemed tax sales are minuscule when compared to the overall number of parcels owned by the plaintiff class. In plaintiffs' revised motion for summary judgment, they seek to exclude from the relief sought those parcels with post-1890 unredeemed tax sales in the chain of title insofar as that unredeemed tax sale might affect the

validity of the lease. The court finds that the interests of all the class members remain the same, but those class members with post-1890 unredeemed tax sales in the chain of title will be excluded from any relief granted herein and, thus, must be dealt with on an individual basis through the filing of individual suits.

The court finds there are no genuine issues of material fact in this case, and it is ripe for summary judgment. Plaintiffs' motion for summary judgment will be sustained, and defendants' motion for summary judgment will be denied. HUD will not be dismissed from this cause, but will remain as a "nominal party" for enforcement of the stipulation it entered into in this case, agreeing to be bound by this court's judgment. However, HUD will not be responsible for any part of plaintiffs' attorneys' fees in the event fees are granted. Likewise, the Columbus Municipal Separate School District shall remain a "nominal party" for purposes of enforcing this judgment, but shall not be responsible for any part of plaintiffs' attorneys' fees.

III.

There are many unresolved motions filed by the parties to this case which will be disposed of as follows:

1. The motion and supplement filed by the Secretary of State to decertify the class shall be denied.

2. The motion by the Secretary of State to strike portions of the affidavits of Dorothy Pridmore and John Krigler, and the motion by plaintiffs to strike the state's expert shall be denied.

3. All other motions to strike and supplement the record and present offers of compromise are hereby denied.

SUMMARY

In the 176-plus years these leases have been in existence, their validity has been confirmed by the Mississippi Supreme Court in 1898, the Mississippi Legislature in 1914, by the Fifth Circuit's prior ruling in this case, and the findings by this court. The leaseholders include not only corporations, but also individuals, the City of Columbus, Lowndes County, twenty-eight churches, Mississippi University for Women, a synagogue, and other nonprofit institutions. Absent a binding judgment in federal court that declares the leases valid, there will be a hornet's nest of litigation in Columbus as leaseholders sue their predecessors in title for breach of their "leasehold warranty deeds."

It has now been approximately nine years since the Secretary of State, HUD, and the school district publicly attacked the Columbus sixteenth section leases. This attack affected leaseholders in the Columbus sixteenth section by diminishing the fair market value of their property and creating a barrier to obtaining financing for the sale of these interests. It is now time to put this matter to rest. The court will enter a final judgment declaring, with respect to the leases of plaintiff Randolph Lipscomb and all other class members, except those class members with a post-1890 unredeemed tax sale in their chain of title, the following:

1. "Renewable forever" in the Columbus sixteenth section leases means all covenants are renewable forever, including the rental covenants.

2. The 99-year renewable-forever leases are not sales.

3. The contracts clause of the U.S. Constitution, Article I, § 10, Clause 1, protects the Columbus sixteenth section lease covenants from impairment under subsequent state law.

4. The December 13, 1830, statute authorizing the 99-year renewable-forever leases in Columbus did not violate any trust obligation.

5. The December 13, 1830, statute was not repealed before 1890.

6. The 1920 leases are renewable leases and may be renewed on August 1, 2019, upon the same covenants unless the lease has been or is subsequently forfeited for failure to comply with the terms of the lease.

7. The terms of the 1920 leases properly allow redemption by the previous lessee after a tax sale, because notice and an opportunity to redeem are required before a 99-year renewable-forever lease may be forfeited.

Let judgment issue accordingly.

APPENDIX D

United States District Court,
N.D. Mississippi.

J. Randolph LIPSCOMB, on Behalf of Himself and all others similarly situated
and the Mayor and City Council of the City of Columbus, Mississippi, as the
Statutorily Designated Successors in Office to the Trustees of Franklin
Academy, Plaintiffs,
v.
The COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, Tom Cooley, Superintendent;
the State of Mississippi, Honorable Richard Molpus, Secretary of State; The
Secretary of the Department of Housing and Urban Development of the United
States of America, Defendants.

No. 1:92CV020-S-D.

July 23, 1996.

OPINION

SENTER, Chief Judge.

The instant case is presently before the court upon plaintiffs' motion for summary judgment and defendants' motion to dismiss or, in the alternative, to abstain. Plaintiffs seek a judicial order declaring valid their leaseholds on sixteenth section land in Columbus, Mississippi. Plaintiffs'

cause of action is grounded in the allegation that any attempt by the state of Mississippi to invalidate the leases pursuant to the 1890 Mississippi Constitution or any subsequent legislation would violate the contracts clause of the U.S. Constitution. Although in the aggregate the litigation presents numerous questions of law, the sole issue currently at bar is narrow: whether this court's exercise of jurisdiction would be proper given the nature of the claims asserted as well as the interests of Mississippi's state courts in having the opportunity to resolve fundamental questions related to the validity of state legislative action under the Mississippi Constitution.

Reduced to its core, this action represents plaintiffs' attempt to validate approximately 1500 public leaseholds. These leases have alternatingly been marked by 170 years of transfers of interests, various lawsuits, and most significantly, frequent legislative regulatory activity. In considering the validity of the leases, even a cursory sketch of their evolution lays bare numerous unresolved questions of law.

I. Facts

The origins and subsequent history of Mississippi's sixteenth-section lands have been well documented in prior decisions. *See Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Madison County Bd. of Ed. v. Illinois Cent. R.R.*, 939 F.2d 292 (5th Cir.1991); *Street v. City of Columbus*, 23 So. 773 (Miss.1898). A succinct review of the facts relevant to the instant case is necessary, however, due to the somewhat unique nature of the Columbus leaseholds.

In 1816, the United States entered into a contract with the Chickasaw Nation whereby, for the sum of approximately $130,000.00, the U.S. extinguished title to land that is now part of northern Alabama and Mississippi. This land included the present-day Columbus sixteenth section which Congress had set aside and "reserved for the support of schools." *Land Sales Act of March 3, 1817*, 3 Stat. 375. Commensurate with

this Act, the Mississippi Constitution of 1817 provided that sixteenth section land could never be sold, and that funds raised through the rental or lease of such lands was to be set aside "for the use of schools." Miss. Const. of 1817, art. 6, § 20. In 1821, the Mississippi legislature authorized the incorporation of the town of Columbus. That same year, the legislature established Franklin Academy and authorized the president and trustees of the school to lease certain lots in the Columbus sixteenth section "for the term of ninety-nine years, reserving an annual rent therefor." 1821 Miss. Laws Ch. XLVI, p. 73-74. In 1830, the legislature amended the statutes to allow for the inclusion of the phrase "renewable forever" within the Columbus leases. 1830 Miss. Laws Ch. II, p. 9-10.

In 1890, several issues that had arisen in regard to sixteenth section lands were addressed when the state of Mississippi adopted a revised constitution. Significantly, section 95 of the 1890 Constitution states in part: "Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals...."

In 1914, upon the request of several Columbus leaseholders, the legislature passed a statute authorizing the renewal of all Columbus leaseholds upon their then-existing prices and rental terms. 1914 Miss. Laws Ch. 462, p. 496-497. Resultingly, when their 99-year duration expired, the Columbus City Council renewed the leases in 1920 on their existing terms.

The more immediate circumstances giving rise to the present litigation began when, pursuant to Section 95 of the Mississippi Constitution and its non- donation principles, numerous sixteenth section leases entered into subsequent to 1890 were declared void. *See Hill v. Thompson,* 564 So.2d. 1, 12 (Miss.1989). Apparently relying in large part upon these judicial decisions, the president of the Columbus school board

announced in 1990 that the Columbus sixteenth section leases were invalid and should be renegotiated. Accordingly, plaintiffs brought suit in the Chancery Court of Lowndes County, Mississippi, to obtain a declaration that their leaseholds were indeed valid. The suit was soon voluntarily dismissed, however, so that the instant class action could be filed in federal court.

II. Discussion

As mentioned above, the focal issue at bar is whether the instant action should be adjudicated in a federal forum. A parsing of plaintiffs' complaint, memoranda, and oral arguments reveals a variety of parallel yet alternative theories plaintiffs have presented on which federal jurisdiction is allegedly based.

The alleged constitutional violation presented in the complaint itself is grounded in the school board's threatened action to void the leases. However, a cause of action brought pursuant to these facts is insufficient to state a cognizable claim under the contracts clause. In *Frazier v. Lowndes County, Miss., Bd of Ed.*, the Fifth Circuit made it clear that a violation of the contracts clause requires legislative action and that mere threats made by a school board are insufficient. *Frazier v. Lowndes County, Miss., Bd of Ed.*, 710 F.2d 1097, 1099 (5th Cir.1983). However, in considering the notice pleading requirements of Fed. R. Civ. Pro. 8 in conjunction with Fed R. Civ. Pro. 15's free allowance of amendments to a complaint, the court has liberally construed plaintiffs' complaint so as to address the alternative theories plaintiffs presented in their memoranda.

These final two arguments confront the more fundamental issue of the universal validity of the leases; that is, whether the protections of the United States Constitution render the leases' terms sacrosanct regardless of what entity (i.e. Mississippi's legislature, Mississippi's Secretary of State's office, the federal

government, etc.) attempts to question their validity. In this regard, the gravamen of plaintiffs' argument is that the lease terms are inviolable because: (1) the leases were renewed in 1920 for a term of 99 years, and any attempt to void them prior to the expiration of the lease term would represent a violation of the contracts clause; and/or (2) the leases were valid prior to the adoption of the revised Mississippi Constitution of 1890, and therefore any attempt to apply the Constitution's provisions relating to sixteenth section land would unconstitutionally impair the obligations of the original contracts.

In examining the merits of the first theory, any assertion that an individual lease is valid today presupposes that the renewal itself was valid. Although the leases were renewed in 1920, the rental price of the renewed leases was set forth in 1914 when the Mississippi legislature agreed to renew the leases on their present terms, an act that has been accorded presumptive validity by both the state and the leaseholders. However, although the issue has never been adjudicated, it is possible that a court could conclude that this legislative act was enacted in contravention of the 1890 Constitution's mandate that rent paid on a sixteenth-section lease shall be of a sufficient amount so that it does not represent a mere donation. If such a conclusion were reached, the legislature's act would be invalid as violative of the Mississippi Constitution. Resultingly, the leases would be void due to their improper renewal in 1920. Moreover, with particular regard to the instant litigation, the issue of the validity of the leases under the United States Constitution would be moot, and the court's determination as to the modern scope of the contracts clause would be unwarranted.

Given the possibility of such a scenario, the U.S. Supreme Court has made it clear that a federal court should abstain from exercising its jurisdiction when an unsettled question of state law must be resolved before a substantial federal question can

be decided. *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Baran v. Port of Beaumont*, 57 F.3d 436, 442 (5th Cir.1995). In *Pullman*, the Supreme Court held that abstention was appropriate when the last word on the interpretation of a state statute rested not with a federal court but a state supreme court. *Pullman*, 312 U.S. at 499-500. The case *sub judice* is factually similar to *Pullman* in this regard, in that a final determination of the legitimacy of the 1914 law under the Mississippi Constitution is properly vested with the Mississippi Supreme Court. Thus, any adjudication in a federal forum would be a mere forecast rather than a definitive ruling.[1] The *Pullman* court warned that such rulings by a federal court were to be avoided, because the district court's tentative answer "may be displaced tomorrow by a state adjudication." *Pullman*, 312 U.S. at 501. As stated in Pullman, "[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Id.* Therefore, notwithstanding the court's original intention to exercise jurisdiction in this matter, it is now apparent that such an act would be manifestly improper. If the limitations placed on sixteenth section leases by the 1890 Constitution denied the legislature the authority to renew the leases at their existing terms, then there is no need to further the litigation; the federal

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[1] Defendants have raised additional questions regarding the propriety of the 1914 law, including an allegation that the legislative procedures used in implementing the law were improper, and an assertion that the statute represents a "special law" benefitting an individual, in violation of § 87 of the 1890 Constitution. These allegations lend further merit to the court's determination that, in many respects, final authority over the present litigation rests with the Mississippi Supreme Court.

Constitutional issue does not arise.[2] Alternatively, if the state court determines the 1914 Act to be valid, the contracts clause issue can continue to be maintained in state court because Mississippi's judiciary has concurrent jurisdiction over such matters. In either event, the federal constitutional claim is afforded full protection, and because ultimate authority upon appeal rests in the United States Supreme Court, plaintiffs' interest in obtaining a federal forum is not prejudiced.

The third and final theory on which plaintiffs attempt to assert federal jurisdiction is similar to those addressed above, but its contours are subtly distinct and historically more far-reaching. Most significantly, it appears to be the theory that plaintiffs have ultimately chosen as their champion in this litigation. This third argument suggests that because the leases were valid when the 1890 Constitution was adopted, then any attempt to void the leases pursuant to the Mississippi Constitution would violate the federal contracts clause as an impairment of prior contractual obligations.

Notwithstanding the possible merits of this argument, it is clear that it is inextricably twined with plaintiffs' second theory of the case and therefore would also be best addressed by a Mississippi court. Such a result avoids piecemeal litigation, while it also protects Mississippi's interest in litigating matters which affect fundamental matters of state fiscal policy as well as Mississippi's scheme for regulating sixteenth section land. Read together, plaintiffs' second and third theories make apparent that the mandate of *Pullman*, in conjunction with the U.S. Supreme Court's decision in *Burford v. Sun Oil Co.*,

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[2] The state law issues regarding the validity of legislative action distinguish the instant action from *Papasan*, *Madison County Bd. of Ed.*, and other opinions in which federal courts exercised jurisdiction. Therefore, the propriety of abstention in this instance is not affected by the fact that issues involving sixteenth section land have been litigated in federal court under other circumstances.

requires abstention in this instance. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The Fifth Circuit has described those situations in which abstention is appropriate under *Burford* as follows:

> [w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'

St. Paul Ins. Co. v. Trejo, 39 F.3d 585, 588 (5th Cir.1994) (quoting *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 369, 109 S.Ct. 2506, 2514-15, 105 L.Ed.2d 298 (1989)).

Additional authority supporting the court's decision to abstain in this instance is derived from *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). In *Thibodaux*, the U.S. Supreme Court noted that while mere difficulty of state law is insufficient to allow a federal court to relinquish jurisdiction, when a district judge is "caught between the language of an old but uninterpreted statute and the pronouncement" of a state official, jurisdiction need not be exercised. *Thiboidaux*, 360 U.S. at 27, 30. Furthermore, although *Colorado River* is factually distinguishable from this case, the U.S. Supreme Court's analysis reiterated the fundamental proposition that abstention is appropriate where "exercise of federal review of the question

in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River*, 424 U.S. at 814.[3]

It is clear that the scenario presented by the instant case demands that this court abstain from exercising its jurisdiction pursuant to the authority of both *Pullman* and *Burford*, and their progeny. The instant case involves unsettled questions of state law, and the ultimate issue questions the legitimacy of complex, state policies involving public lands. And again, abstention does not prejudice plaintiffs' interests, as their federal claims can still be heard in state court, and final authority on appeal is retained by the U.S Supreme Court.[4]

Lastly, the court is aware that "federal courts have a virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 821. However, as recently noted by the U.S. Supreme Court, this obligation is not absolute. *Quackenbush v. Allstate Insurance Co.*, 64 U.S.L.W. 4379, 4382 (U.S. June 3, 1996) (citing *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 422 (1932) (stating that "the proposition that a court having jurisdiction must exercise it, is not universally true")). Plaintiffs are essentially seeking injunctive/declaratory relief, in that they have requested the court to confirm title to the land as well as to restrain the state from enforcing its regulatory scheme designed for the administration of sixteenth section leaseholds. Thus, abstention in this instance no doubt falls within the aegis of the

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[3] Similarly, in light of *Colorado River* and *Burford*, the actions of the Department of Housing and Urban Development in questioning the validity of the leases were insufficient to mandate the court's exercise of jurisdiction.

[4] The court's decision to abstain renders all remaining pending motions moot, although any issues relating to summary judgment or other dispositive matters can of course be raised again before the state court.

court's powers, for "it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity.'" *Quackenbush*, 64 U.S.L.W. at 4382 (quoting *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 120 (1981)).

III. Conclusion

Having thoroughly reviewed the applicable authorities, as well as the memoranda of law and the extensive documentary evidence provided by the parties, the court finds that the cause of action as filed by plaintiffs technically fails to state a cognizable federal claim; yet additionally and more fundamentally, the gravamen of the complaint ultimately brings into question the validity of a legislative act under Mississippi's Constitution. Therefore, as the resolution of these issues in a federal forum would not only represent a mere non-binding forecast but would also disrupt Mississippi's efforts to establish a coherent policy with respect to a matter of substantial public concern, the court refuses to exercise jurisdiction over the entire cause of action and finds abstention to be the only proper alternative.

An order in accordance with this opinion shall be issued.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-60245

Randolph J. LIPSCOMB,
on behalf of himself and all others similarly situated;
MAYOR, CITY OF COLUMBUS; CITY COUNCIL OF
THE CITY OF COLUMBUS, MISSISSIPPI,
as the statutorily designated successors in office to
the Trustees of Franklin Academy,
Plaintiffs-Appellees,

v.

THE COLUMBUS MUNICIPAL
SEPARATE SCHOOL DISTRICT, etc., et al.,
Defendants;

STATE of MISSISSIPPI; ERIC CLARK,
In his Capacity as Secretary of State;
Defendants-Appellants

U.S. COURT OF APPEALS
FILED
NOV 13 2001
CHARLES R. FULBRUGE, CLERK

Appeal from the United States District Court
for the Northern District of Mississippi, Aberdeen

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion October 3, 2001, 5 Cir. __, __ F.3d. __)

Before REYNALDO G. GARZA, HIGGINBOTHAM and SMITH, Circuit Judges.

[X] The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR, R. 35) the Petition for Rehearing En Banc is also DENIED.

[ ] The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR, R. 35) the Petition for Rehearing En Banc is also DENIED.

(2)

Supreme Court, U.S.
FILED
MAR 12 2002
CLERK

No. 01-1176

In The

Supreme Court of the United States

ERIC CLARK,
in His Capacity as Secretary of
State for the State of Mississippi,

Petitioner,

v.

J. RANDOLPH LIPSCOMB, on Behalf of Himself and All Others Similarly Situated; MAYOR, CITY OF COLUMBUS; CITY COUNCIL OF THE CITY OF COLUMBUS, MISSISSIPPI; & THE COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Should the Petition for Writ of Certiorari be denied when two of the questions presented were not raised below and the third was expressly waived?

2. Have the Columbus leaseholders suffered injury in fact when their land titles have been disparaged, they cannot obtain financing, and the value of leaseholds has dropped since the Secretary's pronouncement that the leases were invalid?

3. Does the Eleventh Amendment sovereign immunity doctrine set forth in *Idaho v. Coeur d'Alene Tribe* apply where the only matter in question is the rental amount in a lease, the state itself is not a party to the leases, and there is no challenge to the sovereign's ability to exercise, tax, police, and regulate activities on the land in question?

4. Can a prohibition on donation of state land violate the Contracts Clause when employed by the state to invalidate a pre-existing lease of state land?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by this court's Rule 24(b) and Rule 29.1.

1. Eric Clark, in his capacity as Secretary of State for the State of Mississippi, Defendant/Petitioner;

2. J. Randolph Lipscomb, on behalf of himself and all others similarly situated; Mayor and City Council of the City of Columbus, Mississippi as successors to the Trustees of Franklin Academy, Plaintiff/Respondents;

3. The Columbus Municipal Separate School District, Defendant/Respondent;

4. State of Mississippi, a defendant party to the judgment below but not a petitioner here. *See* Rules of the Supreme Court of the United States, 12.4, 12.6;

5. United States Department of Housing and Urban Development, a defendant party to the judgment below, but neither an appellant below nor a petitioner here.

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Lipscomb v. Columbus Mun. Sep. Sch. Dist., 269 F.3d 494 (5th Cir. 2001)

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 211 of the Mississippi Constitution of 1890 provides in part "[S]ixteenth Section lands . . . nor shall they be leased . . . within municipalities for a longer term than ninety-nine (99) years. . . . "

1914 Miss. Laws Ch. 462 says "[t]hat the successors in office of the trustees of the Franklin Academy in the city of Columbus, State of Mississippi, be and they are hereby authorized and empowered to execute renewal leases on the then-existing term . . . for the term of 99 years, renewable forever. . . . "

STATEMENT OF THE CASE

INTRODUCTION

It has cost the current leaseholders in the neighborhood of $30 million[1] to acquire the leasehold warranty deeds that are at issue in this case. The Mississippi Secretary of State's object here is to make those deeds valueless.

The leaseholders invested this money because state authorities established the lease terms and they repeatedly declared the validity of the low rental terms of those deeds, set in the early 1800s by public bidding. The attorney general did so in 1884, the Mississippi Supreme Court did so in 1898, *see Street v. City of Columbus*, 23 So.2d 773 (Miss. 1898), and the Mississippi legislature did so in 1914, when it authorized renewal of the leases on their existing terms in 1920.[2]

The development of the city in reliance on these lease terms has produced tax revenues to the school sufficient to create the first public school in Mississippi and to put the modern district into the top 15% of all schools in Mississippi in funding per student.[3]

---

[1] That is a minimum present value of the leases. Petn. at 6. It is a reasonable proxy for the cost of the leases to their present owners plus their opportunity cost of not investing elsewhere since the leaseholds were purchased.

[2] *See* Petn. App. at 62a; Act of March 20, 1914, 1914 Miss. Laws Ch. 462; R. 5:1026. The record will be cited here as Volume:page. The leases are for 99-years renewable forever at the original rent. Although unique to Mississippi, the leases are similar to those used to develop Baltimore, MD and, to some extent, Washington, D.C. *See Camp v. Boyd*, 229 U.S. 530 (1913) (Willard property).

[3] App. 29a. See http://www.mde.k12.ms.US/Account/RC2000/4420.PDF

In 1989, however, the Mississippi Secretary of State unilaterally declared that these leases, which date back to 1821, were invalid because of § 95 of the Mississippi Constitution of 1890. He proposed a new scheme of rents which would destroy the leaseholders' $30 million in investment by charging increased rentals on the property.

All the actual parties to the leases oppose the Secretary of State. This includes not only the lessor, the Mayor and City Council of Columbus, as Successor to the Trustees of Franklin Academy; and the lessees, the leaseholder class; but also the beneficiary, the Columbus Municipal Separate School District. This may be because the Secretary wants to use the additional money to lower school taxes as opposed to increasing school funding.

The Fifth Circuit properly used the Contracts Clause to put a stop to the Secretary's 177 years-after-the-fact political shenanigans.

FACTS

The Fifth Circuit opinions found in Appendices A and B provide a sufficient Statement of Facts for these cases. The leaseholders accept as generally accurate the "Background" and "Proceedings Below" sections in the Petition except as follows:

1. The leasehold warranty deeds in issue here return a rent established by public auction in the 19th century. App. 36a. There is no suggestion in the historical record that these were "sweetheart deals." Petn. at 4.

2. The lessees pay property taxes on the leaseholds as if they owned them. App. 29a.

3. There is no record evidence of the settlement attempts described in Petn. at 7-8. Also, a party cannot use settlement discussions to aid its case on liability. *See* Fed. R. Evid. 408. Petn. at 7-8.

REASONS FOR DENYING THE WRIT

1. This court should not grant certiorari to consider issues that either were not raised or were waived below.

This Court has said it "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). This is particularly true where the lower court did not pass on the question, and the respondent objects to its consideration in this Court. In federal appeals such as this one, preservation of error in the lower court is not a jurisdictional bar to review. It is, however, a prudential ground for denying certiorari. When the issue was neither raised nor addressed below, and so the Court of Appeals did not address it, there can be no express "conflict" with any other court on that issue.

Here two of the questions presented were not raised below and a third one was waived.

First, the petition admits that the standing question was not raised below. Petn. at 12 n.29. While standing is jurisdictional and may be raised at any time, to allow petitioner to do so at this late date would be unfairly prejudicial to the leaseholders who, if the issue of particularized standing had been raised in the district court,

could have provided additional proof of particularized injury if someone had thought that was necessary.[4]

Secondly, the Attorney General on behalf of the petitioner expressly waived Eleventh Amendment immunity in the district court. In fact, when the plaintiffs, out of an abundance of caution, affirmatively raised the issue and showed that the Secretary of State was a proper defendant, the petitioners moved for summary judgment seeking affirmative relief in federal court and told the district court:

> [The petitioner believes it is] in the public interest of all taxpayers of the state to fully and finally adjudicate the question of the validity of these leases held by the Plaintiff and Plaintiff class in this forum. . . .

Memorandum of Authorities in Support of Defendant Mississippi Secretary of State's Cross-Motion for Summary Judgment, in Motion to Supplement Record on Appeal, Tab D p. 2.

The state thought the federal forum was an advantage to it – until it lost. That is at the very least a prudential ground for denying review on the Eleventh Amendment question now.

Third, petitioner did not make its "general prohibition" Contracts Clause argument in the Court of Appeals. The argument was not made orally nor can it be found in the Fifth Circuit Brief for Appellants State of Mississippi/ Secretary of State served June 20, 2000. The Table of

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[4] K. Bowman "16th Section landowners hardly 'dancing' amid lawsuit", *The Clarion Ledger*, Oct. 17, 2001, p. 8 (inability to sell or finance sale of Columbus house).

Contents does list a relevant case, *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), but the body of the brief makes no reference to that case and no mention of this argument. The leaseholders object to its consideration here.

2. The plaintiff class has suffered "injury in fact."

Even though the standing issue was not raised, the proof in the district court supported that court's finding that the class has suffered injury. It said:

> This attack affected leaseholders in the Columbus Sixteenth Section by diminishing the fair market value of their property and creating a barrier to obtaining financing for the sale of these interests. It is now time to put this matter to rest.

Petn. App. at 62(a). The injury they have suffered is directly analogous to the injury a plaintiff in a common law cloud on title or slander of title suit would suffer. Because "threatened reduction in property values of land neighboring . . . power plants" can sometimes confer standing, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73 (1978), actual injury to property values should certainly confer standing.

The fact that the respondents did not sue petitioner for damages in federal court certainly does not mean that the respondents have no damages.

In fact, if the issue had been raised below, class representative Randolph Lipscomb would have been able to prove that, while he does not intend to "sell or lease" his property in the near future, Petn. at 10, his inability to use it for financing has had an effect on his ability to

obtain the $100,000 or more he has borrowed to pay some of the fees and expenses in this lawsuit. As it is, the record does attest that, on two occasions, homeowners were prevented from selling or financing sales of their houses because this controversy blocked them from obtaining replacements for leases that were of record but had been lost.[5]

This case is wholly unlike *Warth v. Selden*, 422 U.S. 490, 505, 516 (1975). There none of the plaintiffs owned land in the city they sued and none had asked the city for a building permit. Here the leaseholders all hold 16th Section leases and are directly injured by the Secretary's actions. Moreover, it cannot be disputed that some of the 1484 leasehold warranty deeds in the class have been sold by class members in the 12 years since the Secretary publicly denounced the deeds and unilaterally declared them invalid.

There is no conflict with this Court's decisions[6] and the Petition does not claim that there is a conflict among the Courts of Appeals on these issues.

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[5] Plaintiffs' Appendix of Affidavits and Exhibits, Ex. R (Affidavit of Dewitt Hicks).

[6] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (environmental group in United States did not have standing to sue for loss of endangered species overseas); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (no likelihood shown that plaintiff would be subjected to choke-hold in the future); *Golden v. Zwickler*, 394 U.S. 103 (1969) (wholly conjectural that plaintiff might be prosecuted again for distributing handbills).

3. There is no conflict concerning the application of *Idaho v. Coeur D'Alene* to leasehold disputes.

The Fifth Circuit ruled that it did not have to consider the Eleventh Amendment waiver argument because the suit is one, in effect, to enjoin a state official, i.e., the Secretary of State. Petn. App. at 7a. *See Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986) (Eleventh Amendment no bar to suit against Mississippi Secretary of State in 16th section land dispute).

It is also a suit against the United States Department of Housing and Urban Development, who quit insuring leases in the Columbus 16th Section because of this controversy. Petn. App. at 61a. There is no Eleventh Amendment barrier to a suit against the federal government in federal court.

In addition, the Fifth Circuit found *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997) easily distinguishable. Petn. App. at 7a-9a. The issue here is rent paid to the local school district, not sovereignty. Like *Elephant Butte Irrigation Dist. of New Mexico v. Dep't of the Interior*, 160 F.3d 602 (10th Cir. 1998), the only question at issue is one concerning rent income from public lands. Petn. at 17 n.52.

Respondents fully admit that the land is subject to all of the normal sovereign powers of the state.

But rent to a local school district is money, not sovereignty. Sovereignty is something that cannot be sold or bargained away. Throughout most of the 19th century,

Mississippi could not only rent 16th section land, it could also sell it or even lose it by adverse possession.[7]

In fact, the money does not even belong to the State. The State is not a party to the leases. The rent does not go to the state treasury. This is a dispute concerning the validity and price of leases that are between the Mayor and City Council of the City of Columbus as successors to the Trustees of Franklin Academy and the respondent leaseholders. The beneficiary is the Columbus Municipal Separate School District. The Secretary of State only has an interest in the case because a statute gives the Secretary the authority to recommend suit against the school district if it does not comply with 16th Section leasing laws.[8] The State itself was a party below but has not petitioned for certiorari.

Further support for this can be found in *Coeur D'Alene Tribe* itself, which relied on *Papasan*, a Mississippi 16th Section land dispute fully adjudicated by the federal courts.[9]

None of the allegedly conflicting cases cited in the Petition had anything to do with the rent price of public land. Nor is there yet any well-defined conflict among the

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[7] *Alabama v. Schmidt*, 232 U.S. 168, 173-74 (1914); *Jones v. Gulf Refining Co.*, 34 So.2d 735 (Miss. 1948) (adverse possession of 16th section land arising out of 1875 tax deed). Even today the land can be sold for industrial development. Miss. Const. of 1890 § 211.

[8] Miss. Code Ann. Section 29-3-9.

[9] *See* 521 U.S. at 277.

Courts of Appeal concerning the applicable test in this context, as opposed to others.[10]

4. This is a proper Contracts Clause case because the state constitutional provision that retroactively impairs the leaseholders' contracts is directed solely at public land grants.

Section 95 of the 1890 Mississippi Constitution applies to one thing and one thing only: the terms of state land contracts. Petn. at 2. It says state land cannot be

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[10] *See McDonald v. Village of Northport*, 164 F.3d 964, 969-971 (6th Cir. 1999) (public access to navigable waters was state sovereignty interest) (alternative holding); *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1198 (10th Cir. 1998) (race discrimination case could go forward).

This Court has already granted certiorari to resolve conflicts in the telephone interconnection agreement cases, two of which the Secretary cites, *MCI Telecommunication Corporation v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3rd Cir. 2001), and *MCI Telecom. Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 2000). The cases now pending in this Court are *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 70 U.S.L.W. 3047 (No. 001531, July 17, 2001) and *Mathias v. WorldCom Technologies*, 70 U.S.L.W. 3046 (No. 00-878, July 17, 2001).

Those cases involve a federal statute, the Telecommunications Act of 1996, and the Eleventh Amendment concerns arise out of the nature of the federally-proscribed remedial scheme, whether an ongoing violation of federal law has been shown, whether the state defendants are necessary parties, and whether their quasi-judicial status is significant. *See Bell Atlantic Maryland, Inc. v. MCI WorldCom*, 240 F.3d 279, 295-98 (4th Cir. 2001), *cert. granted sub nom. Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 70 U.S.L.W. 3047 (No. 001531, July 17, 2001). None of those factors are at issue here.

"donated."[11] The leasehold warranty deeds in issue here are lease contracts for land the state told the City to lease long before the 1890 Constitution was adopted.

The prohibition applies to all public land donations and to nothing but public land donations. This case is thus unlike *Exxon Corporation v. Eagerton*, 462 U.S. 176 (1983), in which the prohibition against "pass-through" applied to oil and gas producers who did not have conflicting contracts. *Id.* The effect on the pass-through contracts was "incidental" to the law's main purpose. Here the effect is only on those who receive "donated" land from the State. The effect on the leaseholders' contracts, if the provision were applied, would be central to the law's main purpose, i.e., to prevent donation of public land.

Moreover, the contracts in issue here, unlike the contracts in *Exxon*, are contracts with an agent of the state. This Court in *Exxon* found it significant that the contracts in that case were not state contracts. *See* 462 U.S. at 192 n.13. The Contracts Clause protection has particular force when a state uses legislation to attempt to get out of its own bargain. *Id.*, citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-28 (1977). So there is no conflict between this case and *Exxon*.

Finally, the petitioners incorrectly contend that the leaseholds are not impaired by the 1890 Constitution but

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[11] A companion provision, Miss. Const. of 1890 § 211, limits the time period for leasing 16th Section lands and would also impair the leases in issue here but for the protection of the Contracts Clause.

by a 1990 court decision that construed the 1890 Constitution. They mistakenly rely on a case, *Frazier v. Lowndes County, Miss., Board of Education*, 710 F.2d 1097 (5th Cir. 1983), in which a decision construing the 1890 Constitution did not raise a Contracts Clause question because the lease in issue was a post-1890 lease. Here the leases predate 1890. As the Fifth Circuit said in 1998:

> [In *Frazier*] . . . [w]e only found the Contracts Clause inapplicable . . . because the legal authority upon which the school district relied in challenging the leases predated those leases. . . . Here, on the other hand, the school district allegedly challenges the Columbus leases under the authority of the Mississippi Constitution of 1890, which postdated them – a potential Contracts Clause violation.

See Lipscomb v. Columbus Mun. Sep. Sch. Dist., 145 F.3d 238, 240-242 (5th Cir. 1998); Petn. App. at 42a. *See also* Petn. App. at 12a.

CONCLUSION

There is no conflict. There is no conflict with the decisions of this Court nor is there a conflict with the decisions of the Courts of Appeals. The questions presented were either not raised in the court below or were expressly waived. None of them has merit. This Court should deny the Petition.

FOR THESE REASONS, Respondents pray that the Petition for Certiorari will be denied.

Respectfully submitted,

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(3)

No. 01-1176

Supreme Court U.S.
FILED
MAR 22 2002
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IN THE

Supreme Court of the United States

ERIC CLARK, in His Capacity as
Secretary of State for the State of Mississsippi,
Petitioner,

v.

J. RANDOLPH LIPSCOMB, on behalf of himself
and all others similarly situated; MAYOR, CITY OF
COLUMBUS; CITY COUNCIL OF THE CITY OF COLUMBUS,
MISSISSIPPI; & THE COLUMBUS MUNICIPAL
SEPARATE SCHOOL DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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No. 01-1176

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC CLARK,
in His Capacity as Secretary of State
for the State of Mississippi,
Petitioner

v.

J. RANDOLPH LIPSCOMB, on behalf of himself and all others similarly situated; MAYOR, CITY OF COLUMBUS; CITY COUNCIL OF THE CITY OF COLUMBUS, MISSISSIPPI; & THE COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF

While the instant case was pending before the Fifth Circuit, Petitioner filed suit in the Chancery Court of Lowndes County with respect to four parcels of Sixteenth Section land not included in the class represented by Respondent Lipscomb.[1] Relief sought includes confirmation and removal of clouds on

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[1] Named defendants include the Mayor and City Council of Columbus and the Board of Trustees of the Columbus School District. The latter is charged with refusal to "fulfill its responsibility to administer the leasing " of Sixteenth Section land. Complaint, *Clark v. Mayor & City Council*, No. 2001-0757 (Ch. Ct. Lowndes County, Dec. 3, 2001).

the State's title. Prior to the filing for certiorari, defendants in those actions filed a petition to remove. In addition, Respondents filed a motion to have the district court enjoin the proceedings. In the interim between the filing of the Petition for Certiorari and the Respondents' Brief in Opposition, that court granted Petitioner's motion to remand[2] and denied the motion for injunctive relief.[3] There are, therefore, now parallel state court proceedings involving title to school trust lands in Columbus.

As made clear in the Petition, the Secretary of State's position on the merits is that a proper application of standing criteria and Eleventh Amendment immunity requires a holding that the district court was without jurisdiction. In the event these arguments are rejected, his position is that the case should have been dismissed under *Exxon v. Eagerton* because Section 95 is a "general regulatory measure" that may be applied in state-court litigation contesting the adequacy of consideration for leases of school lands free from restraints imposed by the Contracts Clause.

None of the arguments presented by Respondents in opposing the grant of certiorari present substantive reasons why this case does not meet Rule 10 criteria. Equally important, no credible arguments are presented as to why Respondent Lipscomb and his class, like all other holders of Sixteenth section leases in Mississippi, should not litigate their rights and responsibilities in the courts of Mississippi under criteria set forth in *Hill v. Thompson*.

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[2] *Clark v. Mayor & City Council*, No: 1:02CV1-D-D (N.D. Miss., March 4, 2002)

[3] *Lipscomb v. Columbus Mun. Sep. School Dist.*, No. 1:92CV20-D-D (N.D.Miss., March 4, 2002).

Standing: -- Other than correctly characterizing this litigation as the "functional equivalent" of a case seeking relief from a "common law cloud on title or slander of title,"[4] arguments put forth in support of standing have no substance. First, contentions that, if given another chance, Respondent Lipscomb "would have" proved that it "would have" been easier to obtain $100,000 for purposes of financing this litigation[5] are irrelevant. There is no decision of this Court holding that the standing requirement of Article III can be satisfied by fishing expeditions outside the record designed to postulate hypotheticals in support of the argument that a plaintiff is suffering actual or imminent injury. Rather, the presence or absence of constitutional injury is to be determined by allegations contained in the complaint and/or the summary judgment record of the district court.

Second, when standing is at issue, the determination of whether the "injury in fact" requirement is met in a class action is limited to consideration of facts and circumstances surrounding the named plaintiff at the time the complaint is filed and at the time the class is certified.[6] Respondents' contentions that two homeowners were unable to obtaining financing for sales of their houses[7] and that "some of" the property has been sold in the twelve-year period encompassed from the date of Respondent Lipscomb's initial filing in state court through the federal court proceedings are, therefore, irrelevant.

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[4] Brief in Opposition 6.

[5] *Id.* at 6-7.

[6] *Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

[7] Brief in Opposition 7.

Arguments With Respect to Coeur D'Alene and the Eleventh Amendment: – As an initial matter, Respondents argue that the presence of the Department of Housing and Urban Development as a named defendant removes the "Eleventh Amendment barrier."[8] At all relevant times, however, the role of that agency has been one of a nominal party not actively participating in the summary judgment proceedings or the appeal to the Fifth Circuit.

Second, Respondents contend that since "the State itself"[9] is not a party before the Court, the Eleventh Amendment is inapplicable. This litigation, however, is premised on *Ex Parte Young* and names as defendant the state official (here the Secretary of State) charged with enforcing a state law alleged to be unconstitutional. Similar to *Coeur D'Alene*, it requires resolution of the issue of whether the Eleventh Amendment precludes the use of the *Ex Parte Young* fiction when – for all intents and purposes – federal litigation is the "functional equivalent" of a quiet title action. The presence or absence of the State as a party is, therefore, not a factor to be considered.

Equally so is the argument that since revenue does not flow to the state treasury there is no Eleventh Amendment violation.[10] Although under state law local authorities are statutorily granted the right to administer the property and retain revenue, ultimate responsibility for insuring that local entities comply with the constitutional mandate of Section 95

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[8] *Id.* at 8.

[9] *Id.* at 9.

[10] *Id.*

resides in the Office of the Secretary of State.[11] As recognized as early as 1898, "[u]pon the admission of Mississippi into the Union, the title and control of the school lands vested in the state, in trust for the inhabitants of the various townships."[12]

Finally, it is irrelevant that the myriad of conflicting circuit decisions applying *Coeur D'Alene* have nothing "to do with the rent price of public land."[13] What is important is that the facts of this case (which happen to involve leases of state land) present an appropriate vehicle to provide definitive guidance to the lower courts with respect to the continued vitality of *Ex Parte Young* when a state presents substantive arguments that sovereign interests warrant access to the Eleventh Amendment defense.[14]

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[11] *See, Papasan v. Allain*, 478 U.S. 265, 272 (1986)(explaining delegation to local authorities).

[12] *Street v. City of Columbus*, 23 So 773, 774 (Miss. 1898).

[13] Brief in Opposition 9.

[14] Pointing to an isolated segment of a motion to Supplement the Record before the lower court (incorporating material found in the record made before the district court), Respondents also suggest that Petitioner waived the Eleventh Amendment defense. *Id.* at 5.Waiver, of course, requires a "clear declaration" that the State intends to submit itself to Article III jurisdiction. *College Savings Bk v. Florida Prepaid Postsecondary Ed. Expense Bd.*,527 U.S. 666, 676 (1999). When briefing the merits before the court below, Petitioner made it clear there had been no express or implied waiver in the motion referred to by Respondents. In addition, it was also pointed out there was "no constitutional or statutory provision or court decision that "authorized a state agency or representative to waive the state's . . . immunity." (Reply Brief pp. 14-15). By reaching the merits of the Eleventh Amendment defense, the lower court obviously concluded that waiver was a non-issue.

Arguments With Respect to Exxon v. Eagerton and the Contracts Clause: – There can be no question that Section 95's general prohibition against the donation of lands "belonging to or under the control of the state . . . directly or indirectly, to private corporations or individuals," reflects an exercise of the state's broad power to "adopt general regulatory measures."[15] Once the police power is utilized in this manner, *Exxon v. Eagerton* holds that regardless of whether there are adverse effects on existing contracts between private parties or on those with the state itself, States need not be concerned with real or potential violations of the Contracts Clause.[16] Finally, the fact that neither the Petitioner or Respondents brought the *Eagerton* decision to the attention of the court below has nothing to do with the proper disposition of this case, *i.e.*, it is legal issues not raised in the courts below that are of jurisdictional concern, not the failure of counsel to cite all relevant decisions bearing on an issue properly raised.[17]

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[15] Contrary to Respondents' suggestion, Brief in Opposition 11, the provision has been construed to apply to all state lands, not just those held in trust for the state's schools. *See, e.g., Jackson County Historical Soc. v. Board of Supervisors*, 58 So.2d 379 (Miss. 1952) (site for abandoned courthouse); *United States v. Harrison County*, 399 F2d 485 (5th Cir. 1968)(public beach).

[16] 462 U.S. at 189-192.

[17] Once issues are properly raised, it is common practice for this Court to either bring relevant cases to the attention of council or refer to decisions not cited as precedent in reaching a final decision. *E.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 490 (1997)(bringing to the attention of government counsel a case "not cited" to support "limited rationale" of argument relating to commercial speech); *Romer v. Evans*, 517 U.S. 620, 634, 649 (1996)(analysis by majority opinion and dissent of binding weight that should be given to case not cited by either party).

CONCLUSION

This litigation was designed by Respondents' for one purpose and one purpose only: to use the federal courts as a shield against state-court litigation that places at issue the question whether terms of Sixteenth Section leases in Columbus are so outrageous as to "shock the conscience." In keeping with this objective, Respondents now adopt the position that if this case is litigated in the courts of Mississippi and the Secretary of State's position prevails, it "would destroy the leaseholders' $30 million in investment by charging increased rentals on the property."[18]

Not once, however, does the Brief in Opposition make reference to *Hill v. Thompson* or allude to the twelve years of litigation, negotiations and settlements throughout the State in which equitable criteria set forth in that decision[19] have been employed for the benefit of the state's public schools without inflicting serious economic harm. Thus, without any factual support and with total disdain for the most basic principles of federalism,[20] Respondents contend that Columbus lands are uniquely different and that the state judicial system in general and the Mississippi Supreme Court in particular, cannot be trusted to apply *Hill* in a manner that adequately protects present investments. Certiorari should be granted followed by

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[18] Brief in Opposition 3.

[19] Petition for Certiorari 5-6.

[20] And, equally so, for the interests of the children of Columbus. In yet another editorial dealing with the controversy engendered by the *Lipscomb* litigation, a leading Gulf Coast newspaper concluded that Respondents' refusal to accept responsibility for funds rightfully owed to the schools is "[l]ike stealing candy from a baby," with the only difference being that "[b]abies can live without candy." *Editorial*, The Sun Herald p. C2 (April 4, 2001).

a decision that places the issues and parties in the appropriate forum: the courts of Mississippi.

Respectfully submitted,

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